TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

No. 297

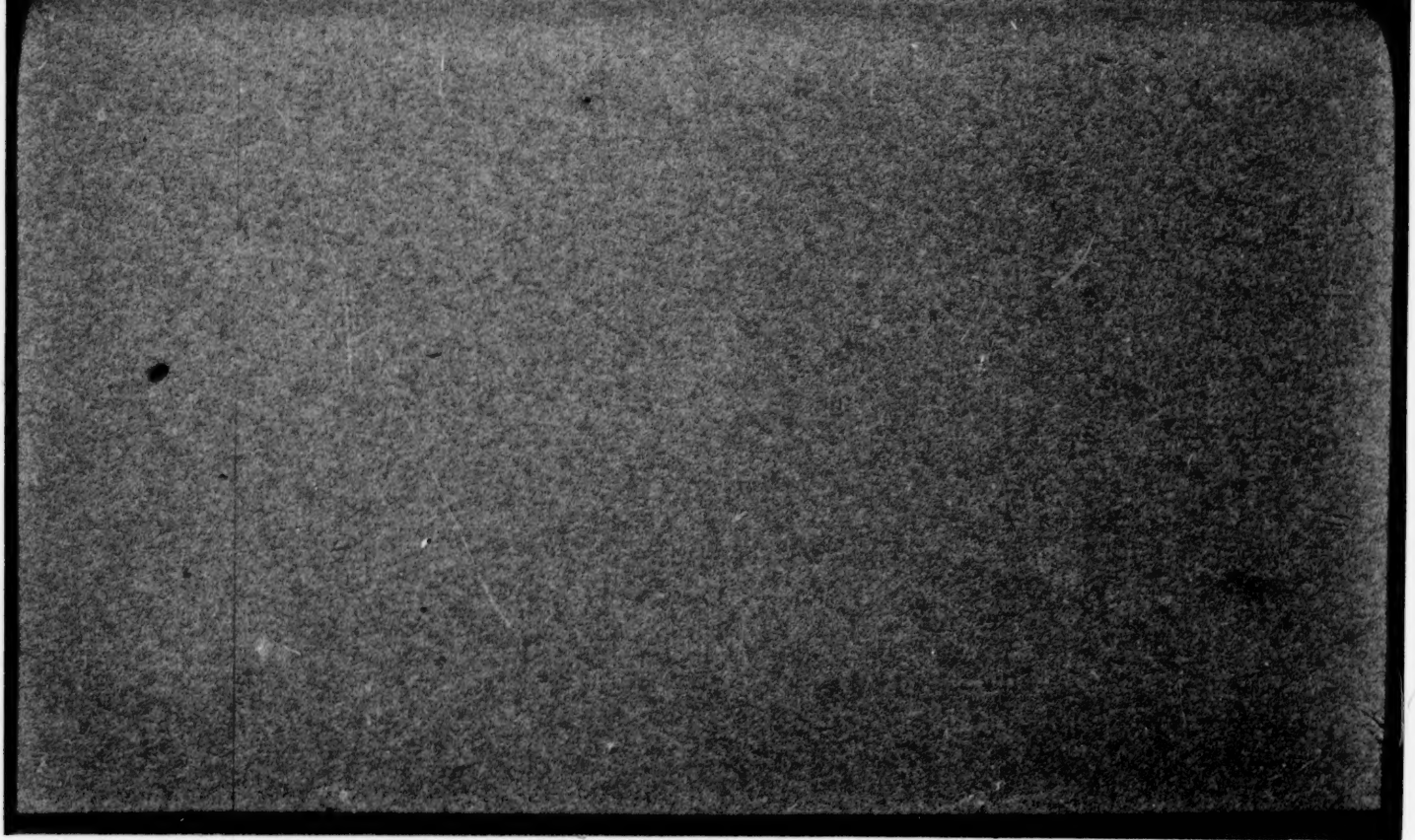
JAMES C. DAVIS, AS AGENT OF THE PRESIDENT OF THE UNITED STATES UNDER THE TRANSPORTATION ACT OF 1920, PETITIONER,

vs.

H. L. CORNWELL

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA.

(28,864)



(29,554)

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[fol. 1] IN THE

SUPREME COURT OF THE STATE OF MONTANA

R. L. CORNWELL, Plaintiff and Respondent,

vs.

JOHN B. PAYNE, Director General of Railroads, as Agent, under the Transportation Act of February 28, 1920 (James C. Davis, as Director General and as Agent Aforesaid, Successor of and Substituted for John B. Payne), Defendant and Appellant.

Transcript on Appeal

Appeal from the Seventeenth Judicial District of the State of Montana in and for the County of Valley

[fol. 2] Judgment Roll

IN THE DISTRICT COURT OF THE SEVENTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF VALLEY

[Title omitted]

AMENDED COMPLAINT

For his cause of action against the above named defendant, the plaintiff alleges:

I. That the defendant, John B. Payne, is the agent designated by the President of the United States under the terms of the United States Transportation Act of 1920, against whom actions at law and suits in equity may be brought based on causes of action arising out of the possession, use, control or operation by the United States of railroads or systems of transportation of any common carrier.

[fol. 3] II. That pursuant to the terms and provisions of said Transportation Act of 1920, the defendant, John B. Payne, has heretofore filed in the District Court of the United States for the District of Montana, a statement of and naming the carriers with whom he has contracted for the conduct of litigation arising out of the operation of the railroad or system of transportation of such carrier during the period of the control of railroads by the United States Railroad Administration.

III. That among the carriers named in said statement so filed as above stated, is the Great Northern Railway Company.

IV. That the Great Northern Railway Company at all times hereinafter mentioned has been and still is a corporation duly organized and existing under and by virtue of the laws of the State of

Minnesota, and the owner of a line of railway with roadbed, track, tra-ns, cars, locomotives and other equipment thereunto appertaining, extending easterly from Glasgow, Montana, to the city of St. Paul in the state of Minnesota, and at all times hereinafter mentioned the said United Railroad Administration, in charge and control thereof, [fol. 4] were operating the said line of railway, together with the roadbed, tracks, trains, cars, locomotives and other equipment thereunto appertaining, and at all times hereinafter mentioned said United States Railroad Administration was a common carrier of livestock and other commodities for hire and reward between the city of Glasgow, Montana, and the city of Chicago, in the state of Illinois.

V. That at all times hereinafter mentioned said plaintiff was the owner of, entitled to the possession, and in the possession of two hundred thirteen (213) head of stock cattle consisting of sixty-five (65) head of four-year-old steers, seventy-five (75) head of three-year old steers, fifty (50) head of two-year old steers, and twenty-two (22) dry cows, all of which said cattle were prior to the 2nd day of October, 1918, grazing upon the range in the vicinity of Buggy Creek and the Dry Fork of Porcupine Creek in Valley County, Montana, a distance of about thirty-five (35) miles north of said city of Glasgow.

VI. That on or about the 23rd day of September, 1918, said plaintiff then intending to ship all of the aforesaid cattle over the line of railway above mentioned from Glasgow, Montana, to the [fol. 5] Union Stock Yards at Chicago, Illinois, ordered directed and requested the United States Railroad Administration to furnish on and not later than the 2nd day of October, 1918, for the transportation of said cattle nine (9) suitable stock cars such as were theretofore customarily used by the said United States Railroad Administration in the transportation of cattle and said plaintiff ordered, directed and requested that said cars with the locomotive with which to move the same be available for the loading and transportation of said cattle at Glasgow in the early morning of the 2nd day of October, 1918.

VII. That said order, direction and request for said cars and motive power were by the plaintiff given to the agent of said United States Railroad Administration in charge of the transaction of the business of said United States Railroad Administration, at the city of Glasgow, in the State of Montana, and at the time of the giving of said order, direction and request said agent of said United States Railroad Administration agreed with and promised the plaintiff that said cars and said motive power would be furnished in the early morning of October 2, 1918, as directed and requested.

VIII. That the period of time elapsing between the 23rd day of [fol. 6] September, 1918, and the 2nd day of October, 1918, was a reasonable time to enable said United States Railroad Administration to supply and furnish said cars and motive power for the use of said plaintiff in the transportation of said cattle, and at all times after the 23rd day of September, 1918, until said cars and motive power were furnished to plaintiff by said United States Railroad Adminis-

tration, as hereinafter set forth, said United States Railroad Administration well knew that the plaintiff intended to and desired the use of said cars and motive power, and well knew that said plaintiff was relying on the furnishing of said cars and motive power on the 2nd day of October, 1918.

IX. That plaintiff's said cattle at the time said order for said cars and motive power was given to said United States Railroad Administration, were feeding and grazing on the range and on lands in the vicinity of said Buggy Creek and the Dry Fork of the Porcupine Creek, and thereafter, relying upon the agreement of said United States Railroad Administration to furnish cars and motive power for the transportation of said cattle on the 2nd day of October, 1918, said plaintiff caused all of said cattle to be rounded up, and driven to a point about five or six miles northwest of the city of Glasgow, Montana, a distance of about thirty (30) miles, arriving at said [fol. 7] point with said cattle on the evening of October 1, 1918, so that the same could be delivered to the United States Railroad Administration for transportation on October 2, 1918.

X. That on the evening of October 1, 1918, said plaintiff had driven said cattle to said point in the vicinity of said Glasgow, Montana, to-wit: about five or six miles northwest of said Glasgow, and was prepared and ready, able and willing to deliver all of said cattle to the said United States Railroad Administration at its stockyards about one (1) mile east of said city of Glasgow in the early morning of October 2, 1918, and could readily have so delivered said cattle at said stockyards, but in the evening of said first day of October, 1918, while said cattle, all of which were then in prime beef condition, were at said point near said city of Glasgow, the said United States Railroad Administration notified said plaintiff that they were unable to and could not and would not furnish the cars and motive power necessary to load and transport said cattle on October 2, 1918 and informed said plaintiff that they could not and would not receive said cattle at their said stockyards or at any other place for transportation, and also informed said plaintiff that they could not tell him definitely just when they would be able to furnish said cars and motive power.

[fol. 8] XI. That owing to the scarity of food at said Glasgow, and the impracticability of holding said cattle in the vicinity thereof until said United States Railroad Administration would furnish and supply said plaintiff the necessary cars and motive power to move the same, it became and was necessary for said plaintiff to drive said cattle from the point where they were so stationed about five or six miles northwest of Glasgow out to a point near plaintiff's ranch on Buggy Creek about eighteen (18) miles north and west of Glasgow, and to retain the same closely herded in his possession until such time as said United States Railroad Administration would receive said cattle for transportation and furnish the necessary cars and motive power therefor; that said United States Railroad Administration negligently, carelessly, wrongfully and unlawfully refused and

failed to receive and accept said cattle for transportation and to furnish the necessary cars and motive power for the transportation thereof, until on or about the 16th day of October, 1918.

XII. That by reason of said wrongful, negligent, careless and unlawful acts of said United States Railroad Administration, said plaintiff sustained injuries and was damaged thereby in the following respects, to wit:

[fol. 9] (a) That by reason of being compelled to drive said cattle from Glasgow, Montana, to the vicinity of plaintiff's ranch upon the refusal of said United States Railroad Administration to receive and accept them on the 2nd day of October, 1918 and retaining said cattle in close herd and off their accustomed range, and the driving of said cattle from said ranch back to Glasgow on or about the 15th day of October, 1918, said cattle were greatly shrunken in weight and became gaunt and emaciated and greatly deteriorated in their reasonable value and in the market price, by reason of which plaintiff was and is damaged in the sum of Sixteen Hundred Fifty Dollars ($1,650);

(b) That had said cattle been accepted and the transportation thereof commenced by said United States Railroad Administration on the 2nd day of October, 1918, they would have arrived in Chicago, Illinois, on or about the 8th day of October, 1918, and on said date would have been sold upon the market in said city, but on account of said acts of said United States Railroad Administration did not arrive in the city of Chicago and could not be sold on the market until or or about the 22nd day of October, 1918, and by reason thereof said plaintiff was compelled to and did sell said cattle at a price much less than he would have received had the same [fol. 10] been sold upon the market on or about the 8th day of October, 1918, to his damage in the sum of Thirteen Hundred Forty-Five ($1,345) Dollars.

XIII. That by reason of the wrongful, negligent and careless acts of said United States Railroad Administration the cattle of said plaintiff, although in prime beef condition when first tendered to said United States Railroad Administration on or about October 2nd, 1918, were by reason of said acts of said United States Railroad Administration greatly shrunken and depreciated in value, and by said acts were reduced from a prime beef condition so that on the 22nd day of October, 1918, they were necessarily graded below prime beef on the market in Chicago, Illinois, and by reason thereof were greatly depreciated in the reasonable value of the same.

XIV. That by reason of the aforesaid wrongful, negligent and careless acts of said United States Railroad Administration, said plaintiff has sustained damages in the sum of Two Thousand Nine Hundred Ninety-five ($2,995.00), Dollars, as aforesaid, no part of which said sum has been paid.

Wherefore plaintiff prays judgment against the defendant for the [fol. 11] sum of Two Thousand Nine Hundred Ninety-five Dollars ($2,995.00), with interest thereon at the rate of eight (8) per cent per annum from and after the date hereof; together with plaintiff's costs and disbursements incurred in and by reason of this action.

Norris, Hurd, Rhoades & Hallett, Attorneys for Plaintiff.

In District Court of Valley County

(Title of Court and Case)

Answer

Comes now John B. Payne, Director General of Railroads as agent under the United States Transportation Act of 1920, named as defendant in the above entitled cause, and for his answer to the amended complaint on file therein admits, alleges and denies, as follows: to-wit:

I. Admits the allegations set forth and contained in Paragraphs I, II, III, and IV of said amended complaint.

II. Admits that on or about the 23rd day of September, 1918, certain cars were ordered for loading with cattle at Glasgow, Montana, on or about the 2d day of October, 1918, but defendant denies [fol. 12] that the agent of said United States Railroad Administration at said Glasgow promised or agreed on behalf of said Railroad Administration to furnish said cars for loading on October 2d, or any other date.

III. Further answering defendant admits that said cars were not furnished on said 2nd day of October, 1918, and that said cars were not loaded and received by said Railroad Administration until about the 16th day of October, 1918, but alleges that said cars were furnished within a reasonable time after the order or request for same was placed.

IV. Save and except as hereinbefore specifically admitted or denied, this answering defendant denies each and every allegation, matter and thing set forth and contained in said amended complaint.

Wherefore, defendant prays that plaintiff take nothing by this action and that he have judgment for his costs and disbursements herein.

L. Parker Veazey, Jr., W. L. Clift, and R. H. Glover, Attorneys for Defendant, Great Falls, Montana.

[fol. 13] IN DISTRICT COURT OF VALLEY COUNTY

(Title of Court and Case)

REPLY

Comes now the plaintiff in the above-entitled action, and for his reply to the answer of the defendant, therein alleges and denies, as follows:

I. Replying to that part of the answer of the defendant, wherein defendant alleges that it furnished cars for the transportation of said cattle within a reasonable time after the receipt of the order for said cars, the plaintiff alleges that he ordered said cars on September 23rd, 1918, and at said time was promised by the defendant that the same would be furnished to him on October 2nd, 1918, and that the said cars were not furnished to him so that he was enabled to load his cattle therein until October 16th, 1918, and plaintiff further alleges that the delay until said October 16th, 1918, or any delay after said October 2nd, 1918 in furnishing said cars was not a reasonable delay; in fact the said delay until October 16th or any delay after October 2d in furnishing said cars, was unreasonable.

Wherefore, Plaintiff, having fully replied to the answer of defendant herein, renews his prayer for relief, as set forth in the amended [fol. 14] complaint on file in the above-entitled action.

Norris, Hurd, Rhoades & Hallett, Attorneys for Plaintiff.

IN DISTRICT COURT OF VALLEY COUNTY

(Title of Court and Case)

VERDICT—Filed March 12, 1921

We, the jury in the above-entitled action find all the issues in the above entitled case, in favor of the plaintiff, R. L. Cornwell, and against the defendant, and fix and determine the amount of damages to which plaintiff is entitled herein, in the sum of $2,995.00 and interest at eight per cent from the commencement of action.

Hugh J. Hughes, Foreman of the Jury.

[File endorsement omitted.]

IN DISTRICT COURT OF VALLEY COUNTY

(Title of Court and Case)

JUDGMENT—Filed March 12, 1921

This cause came regularly on for trial on the 8th day of March, 1921, pursuant to an order theretofore duly given and made setting the said cause for trial for said date, Messrs. Norris, Hurd, Rhoades & Hallett appearing as counsel for the plaintiff, and Messrs I. Parker Veazey, Jr., R. H. Glover and Dignan and Shea, appearing as [fol. 15] counsel for the defendant. A jury of 12 competent and qualified persons was duly sworn, empaneled and selected to try the issues in said case. Thereupon witnesses were sworn and examined and testified on behalf of both the plaintiff and defendant and documentary evidence was introduced on behalf of both of said parties and each of said parties thereafter announcing that they had no further evidence to offer, each rested his case.

Whereupon the court instructed the jury as to the matters and questions of law involved in said cause, and thereafter said cause was argued by the counsel of the respective parties to said jury, after which said jury on the 12th day of March, 1921 retired to their room in charge of sworn ba-liffs, to consider of and to deliberate upon its verdict. Thereafter said jury was returned into open court by said ba-liffs, and being called answered to their names and through their foreman said they had agreed upon a verdict in said cause. Whereupon said verdict was ordered delivered to and was delivered to the court and by the court ordered to be filed, recorded and read to the jury, which was by the clerk of said court so done, and thereafter in response to the inquiry of said court, said jury reported that said verdict was and is their verdict and which is as follows to-wit:

[fol. 16] "We, the jury in the above entitled cause, find all the issues therein in favor of the plaintiff, R. L. Cornwell, and against the defendant, and fix and determine the amount of damages to which said plaintiff is entitled in the sum of Two Thousand Nine Hundred Ninety-five & 00/00 dollars ($2,995.00) with interest thereon at the rate of eight (8) per cent per annum from the date of the commencement of this action.

H. J. Hughes, Foreman of the Jury."

Wherefore, by reason of the law and the premises aforesaid and of said verdict,

It is ordered, adjudged and decreed that said plaintiff, R. L. Cornwell do have and recover of and from the said defendant, John B. Payne, as agent under the United States Transportation Act of 1920, the sum — three thousand one hundred thirty-eight & 71/100 dollars ($3,138.71), together with plaintiff's costs and disbursements incurred in and by reason of this action amounting to and taxed in the sum of one hundred ninety and 94/100 dollars ($190.94), with in-

terest on all of said sums at the rate of eight (8) per cent per annum from the date hereof until paid.

Judgment rendered this 12th day of March, A. D. 1921.

[fol. 17] J. B. Christophersen, Clerk of the District Court, by J. P. Sternhagen, Deputy.

[File endorsement omitted.]

In the District Court of the Seventeenth Judicial District of the State of Montana in and for the County of Valley

[Title omitted]

Order of Substitution—Filed Oct. 5, 1921

Upon motion of the defendant and pursuant to stipulation between the parties it is hereby ordered that James C. Davis, as Agent under the United States Transportation Act of 1920, may be and he is hereby substituted as defendant in the place of John B. Payne as agent aforesaid, and that the title of this *this* action be amended [fol. 18] by substituting the name of said substituted defendant in the place of John B. Payne, and that the motion for a new trial herein shall be determined by the Judge of the above entitled court at any place in the State of Montana, the order in reference to said motion for a new trial to be effected when filed in the office of the Clerk of the above entitled Court.

Dated this 3 day of Oct., 1921.

C. D. Borton, Judge.

In the District Court of the Seventeenth Judicial District of the State of Montana in and for the County of Valley

[Title omitted]

Stipulation re Substitution—Filed Oct. 5, 1921

It is hereby stipulated and agreed by and between the plaintiff and defendant in the above entitled cause that James C. Davis, as Agent under the United States Transportation Act of 1920 the successor [fol. 19] of John B. Payne, as such agent, may be and hereby is substituted as the party defendant in the above entitled cause and that the motion for a new trial by the defendant may be heard and considered by the Judge of the above entitled Court at any place in the State of Montana, and his decision made thereon at any place in the State of Montana, the same to become effective when the order in reference to a motion for said trial shall be filed in the office of

the Clerk of the above entitled court, and that an order of Court may be made in accordance with this stipulation.

Dated this 1st day of September, 1921.

Norris, Hurd, Rhoades, & Hallett, Attorneys for Plaintiff.
I. Parker Veazey, Jr., W. L. Clift, and R. H. Glover, Attorneys for Defendant.

[Title omitted]

[File endorsement omitted.]

IN DISTRICT COURT OF VALLEY COUNTY

(Title of Court and Case)

NOTICE OF INTENTION TO MOVE FOR NEW TRIAL—Filed March 19, 1921

To the Plaintiff in the above entitled cause and to Messrs. Norris, [fol. 20] Hurd, Rhoades & Hallett, his attorneys:

You, and each of you, will please take notice that (having first received notice of the entry of judgment herein by a written notice served upon the defendant on the 15th day of March, 1921, wherein and whereby the defendant was advised, and was first advised and given notice that judgment had been entered in the above entitled cause on the 12th day of March, 1921), the defendant in the above entitled cause, as the party aggrieved, intends to move the Court to vacate and set aside the verdict of the jury herein, and to grant a new trial of the above entitled cause, upon the following grounds, which are grounds materially affecting the substantial rights of said defendant, to-wit:

1. Irregularity in the proceedings of the Court, Jury and adverse party, by which said defendant was prevented from having a fair trial of said cause.

2. Orders of the Court and abuse of discretion, by which said defendant was prevented from having a fair trial of said cause.

3. Misconduct of the jury.

4. Accident or surprise which ordinary prudence could not have guarded against.

5. Newly discovered evidence material for said defendant, which [fol. 21] said defendant could not, with reasonable diligence, have discovered and produced at the trial.

6. Excessive damages appearing to have been given under the influence of passion and prejudice.

7. Insufficiency of the evidence to justify the verdict.

8. Insufficiency of the evidence to justify the decisions of the Court adverse to said defendant in the course of the trial.

9. That the verdict is against law.

10. Errors in law occurring at the trial, and excepted to by said defendant.

Said motion for a new trial will be made upon a Bill of Exceptions hereafter to be served, settled and filed, and upon affidavits hereafter to be served and filed.

I. Parker Veazey, Jr., W. L. Clift, and R. H. Glover, Attorneys for Defendant.

Indorsed: Due service of written notice this 18th day of March, 1921 is hereby admitted. Norris, Hurd, Rhoades and Hallett, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 22] IN THE DISTRICT COURT OF VALLEY COUNTY

(Title of Court and Case)

Bill of Exceptions—Filed June 14, 1921

Be it remembered, That the above entitled cause came on regularly for trial before the Honorable C. D. Borton, Judge of the Seventeenth Judicial District of the State of Montana, in and for the County of Valley, sitting with a jury in attendance, on the 18th day of March, 1921. Messrs. Norris, Hurd, Rhoades & Hallett appeared as attorneys for the plaintiff, and I. Parker Veazey, Jr., W. L. Clift and R. H. Glover appeared as attorneys for the defendant. A jury of twelve persons was duly and regularly sworn and impanelled to try said cause.

Whereupon the following proceedings were had, orders made, objections interposed and rulings made by the Court, and exceptions taken, and the following sets forth all of the proceedings had and so much of the substance of the evidence and testimony offered or introduced on the trial of the above entitled cause as is necessary to explain the objections made and exceptions taken set forth in this Bill of Exceptions, to-wit:

JAMES R. STEPHENS, being first duly sworn as a witness on the part of the plaintiff, testified as follows:

[fol. 23] Direct examination:

My name is James R. Stephens.

I live about 17 miles northwest of Glasgow and have lived there during the last thirty years. I have known the plaintiff for about 29 years, during which time also he has resided in that same vicinity where I reside. I have been engaged in the business of farming and stock raising actively for 21 years in this county of Valley and have had experience in handling stock cattle such as is grown upon the public range, and in shipping them over railroads all the time that I have been in business for a period of over 21 years, and during this time I have accompanied most of the shipments of cattle that I made. This experience has included shipping cattle from Glasgow to the Union Stock Yards at Chicago for the purpose of placing them on the market. I recall in the year 1918 being at the station at Glasgow on the railroad of the Great Northern Railway Company, in September of that year, then in charge of the United States Railroad Administration; the plaintiff was also there. I knew Cahan when I saw him; he was the agent who was in charge of that station.

By Counsel for the Plaintiff: It is admitted in this case that cer-[fol. 24] tain cars were ordered on the 23rd of September, 1918; were you there when Mr. Cornwell ordered the cars?

A. I was.

By Counsel for Defendant: There is no testimony yet that Mr. Cornwell ordered the cars.

By the Court: Let the answer stand.

Q. To whom was any request that you heard for cars made by Mr. Cornwell, if any was made?

A. To Mr. Cahan: I am not right positive about what time of day it was on the 23rd of September, 1918.

Q. What did you hear Mr. Cornwell say, if anything, to Mr. Cahan with reference to the number of cars he required.

A. Told him he wanted 9 cars for October 2nd, 1918. The real wording was that he wanted them on Wednesday a week; that would have been October 2nd. When the order was put in he asked if he thought we were certain to get cars. Mr. Cahan hesitated for just a moment and then said he was not right certain that there was plenty of cars and there would be no trouble if they had time to get them there, but he said your time is a little short.

[fol. 25] By Counsel for Defendant: We move to strike out the statement that Mr. Cahan said there was plenty of cars as hearsay. Which motion was by the Court overruled; to which ruling of the Court the defendant by his counsel then and there duly excepted, which said exception was thereupon duly noted and allowed and is hereby preserved of record.

Witness, continuing: Mr. Cornwell asked,—he says how much time do you need; you got ten days or more. Mr. Cahan says,—Oh, yes, you want them for Wednesday week, he says; I thought you were ordering them for the coming Wednesday, he says; if that is the fact there will be no question about your getting the cars for October 2nd, which is Wednesday a week from the time we were ordering the cars, and he also said, now, he says, be cautious about ordering any cars you will not need, because, he says, there is plenty of cars and you will get every car you order. That was substantially the conversation. Besides Mr. Cornwell and myself, Rush Jacobson was also present. After this conversation I left the station.

At that time I was familiar with Mr. Cornwell's cattle which he intended to ship; they were running in the vicinity of the dry fork [fol. 26] of the Porcupine, about 35 miles North of Glasgow; some were running still farther North and some South; they were scattered over a considerable territory; their ordinary and customary range was an open range; most of the cattle had been raised on that range. I have known the country between that point and Glasgow ever since I have been in the country, and have had occasion to ride it frequently, and I am thoroughly familiar with it. I know the class of cattle that Mr. Cornwell had upon this public range at that time. As a cattle grower I have had experience with different strains of cattle, such as Herefords and Shorthorns. The older stock of Mr. Cornwell's cattle were of Hereford breeding; some of the younger were grade Shorthorns. I had seen his cattle during the summer of 1918 and saw them after September 23, 1918. After September 23, 1918, they were rounded up on that range just in time, as we thought, to get them to the road for shipment. I have had about twenty years' experience in moving cattle from that particular range to the loading stock yards at Glasgow, so that I had a good idea of about what length of time under the conditions then existing would be required in order to get the cattle to Glasgow to be loaded out. Mr. Cornwell did succeed in getting the cattle to be shipped, in [fol. 27] shape, so as to get them to Glasgow by October 2nd. The cattle that were to be shipped consisted of steers from 2 to 4 years old, and probably a few may have been 5 years old, and some dry cows. I assisted Mr. Cornwell in rounding them up and in cutting them out preparatory to shipping and assisted him in bringing them from that point to the railway at Glasgow. Mr. Cornwell got together for shipment something like 212 or 213 head; they were in splendid condition for the market. The aged steers I would call No. 1 or choice and then the cattle were graded down and there was some inferior stuff. The four-year old stuff was top stuff; yes, sir, all of them. Those coming 5 were in the same condition. The 3-year old steers were in good condition. Compared with other cattle of that particular age under those circumstances they were what you would call No. 1 of that class; yes, sir. The 2-year old steers were good stuff of that age, in good condition for beef purposes. As regards the whole bunch of 212 being in prime beef condition for that class, probably every one was not but they were all in good condition. Generally they were in prime beef condition. It took

3 days to gather the cattle, and probably a couple days to cut them out, and then 2 days to get them in to a point near Glasgow, about 5 or 6 miles Northwest of Glasgow, called the Wallett place. They [fol. 28] arrived there October 1st in the middle of the afternoon. The agent was then notified that the cattle would be ready for shipment the next day; I gave this notice to him myself. When we had taken the cattle to the Wallett place I came right on in to town—Glasgow—and notified him to this effect, as he had previously requested me and Mr. Cornwell to do when the cars were ordered. I came in and notified him that the cattle would be put in the yard at Glasgow the next morning at 8 or 9 o'clock, ready for shipment. Yes, sir, I was giving him that notice with reference to the Cornwell cattle. This person was Mr. Cahan, the agent, the same person that Mr. Cornwell had the conversation with on September 23rd. I told him the cattle were up the river some five or six miles and we would have them in the yards between 8 and 9 o'clock the next morning and would probably take up till noon to get them separated and ready for loading. At the time we ordered the cars he requested that we give him this advance notice. When I informed him that the cattle would be ready for loading the 2nd of October, he said they could not load them, as they did not have the cars. I asked him if he could give us any satisfaction as to when they could furnish the cars, but he said he could not give us any information whatever. He then told me I had better call the following Saturday and see if they could get the cars for the next [fol. 29] Wednesday; then he says, it would probably be more convenient for you to inquire at Tampico; he said you can go there and inquire of Mr. Fisher, the agent, at Tampico, and he can take it up with the dispatcher as well as I can. He knew I lived in the vicinity of Tampico. I told him it would be more convenient for me to deal with Mr. Fisher because I lived there. I went over to Tampico on the following Saturday as suggested by Mr. Cahan, and told Mr. Fisher what had happened and asked him to take it up with the dispatcher and see if he could get any information about the cars. I remained at Tampico at this time only a short time. I got no definite information. Mr. Fisher communicated with the dispatcher immediately and then asked me to call the following Monday night, when he would probably give me some satisfaction at that time.

Q. In the meantime, Mr. Stephens, what had become of the Cornwell cattle?

A. They had been thrown just above my ranch on the West side of Buggy Creek. We arrived at the Wallett place on October 1st and moved them back to Buggy Creek on October 2nd, because we could not load them out; we had no other reason for moving the cattle back from the Wallett place back to our ranch, other than the [fol. 30] fact that we could not deliver them to the company. Mr. Cornwell was in a position on the 1st of October, 1918, with the cattle, so that he could have delivered them to the United States Railroad Administration on October 2nd at Glasgow. It would have required 4 to 6 hours to have delivered them from the Wallett place

to the stock yards at Glasgow. Those cattle from the time they were taken from the range on the dry fork of the Porcupine to the Wallett place were handled with much care and in driving them back from the Wallett place they were looked after very carefully. Nearly all day was consumed in moving the cattle from the Wallett place back to the point near my ranch—something like 12 miles. They were properly handled at all times. They were taken to the point in the vicinity of my ranch because we had no other place where we could take them and hold them in order to get them to the railroad when we would be notified we could get the cars. There was no available place between Glasgow and the Wallett place where the cattle might be grazed awaiting the cars because it was all fenced, or any place in the vicinity of Glasgow where the cattle could be grazed. The place where we took them was the closest point where it was necessary to take the cattle in order to find proper grazing facilities. When we got to the place where we intended to hold [fol. 31] them we put them on the range there and looked after them very closely until we brought them back the second time. In that locality at that particular time the range was poor; it had been pastured very heavy all Summer. The cattle were not taken to their customary range on the dry fork for the reason that it would have taken a week to re-gather and bring them to the road, and we would have had to have a week's notice from the railway company before we could have brought them in. We kept them on the range north of my ranch for the purpose of keeping them as close to the railroad as we could, and on account of certain things that made it easier to hold them. There was one watering place on that range about a mile and a half from my residence; from this water hole the range extended 8 or 9 miles North and 3 miles West; they could go still further North, but it was not altogther open much farther than 8 or 9 miles North. As regards what was done in handling the cattle on that range and in keeping them together and rounding them up, and things of that sort, we simply rode after them almost continually through the day-time. The manner in which we held them was this:—Every night they would attempt to go back to their old range and go North on the West side of Buggy Creek; that was fenced all the way up and they would attempt [fol. 32] to go back to their original range, and every morning some one of us would go up Buggy Creek 7 or 8 miles and bring them back to where the water was. That condition continued every day for two weeks. Some of the cattle, of course, would go farther away from the water-hole than others, but ordinarily some went something like 7 or 8 miles; there was no other way of handling the cattle in order to keep them in shape so that they might be shipped. In endeavoring to keep them rounded up we did not drive them on the range any more than was absolutely necessary. In this handling of them they were looked after as carefully as we could.

Q. Now, then, when did you get definite information as to the date when the cars would be available for the Cornwell cattle?

A. Monday evening at 7 o'clock, October 14th. I got this infor-

nation from Mr. Fisher at Tampico. The railroad did not send word to me, but I went and got word and was told that the cars would be available on the 16th. The cattle were then moved to the railroad. The first day we drove them back to this Wallett place where we had taken them on the first trip—about 12 miles—arriving there some time in the afternoon where they were kept that night and some time between 3 and 4 o'clock the next morning we started [fol. 33] to move them to the railroad at Glasgow, getting to the stockyards there between 8 and 9.

Q. On that date it is admitted that you did deliver them to the railroad administration and they accepted them; that is a fact, it is?

A. Yes, sir.

By Counsel for Defendant: I don't think the pleadings do admit the delivery.

Q. Well, these were the Cornwell—some of them were the Cornwell cattle that were delivered on that date.

A. Ys, sir; they were the same cattle that had been moved towards the railroad on October 1st and stopped at the Wallett place. Some of the cattle were suffering from sore feet and had shrunken. With cattle of that character suffering from sore feet is painful and tends to cause shrinkage and is an indication that they had been driven hard. Up to that time I had seen those cattle practically every day from the day they *they* were rounded up until the 16th of October, 1918, and part of the time I was with the cattle. At no time during that period from the time they were first rounded up until October 16, 1918, had these cattle been improperly treated or handled; they were handled as carefully as it was possible to handle them. The cattle were later loaded and I went on the same train [fol. 34] on which they were shipped; they were shipped to Chicago. I left the train at Western Avenue at Chicago; I got off the train Sunday night, I think, something like 10 o'clock. I am not quite positive of the day they were sold. I know it was on Tuesday after we left Glasgow; we loaded out on Wednesday and it was the next Tuesday before they were sold. They were in the yards Monday, but not sold until Tuesday. Yes, sir, I saw the Cornwell cattle in the Union Stock Yards at Chicago on Monday, about Noon. They were consigned to Clay, Robinson Commission Company. I can't say that I know the time of day when buying ceases on the Chicago market for cattle from the western ranges. The sales are more active in the forenoon. I got familar with the market there at that time and was keeping myself informed the best I could some time previous to this from the time the range season started from the middle of August on, by reading market reports that I was receiving from different commission firms and a Drovers Journal which I received, and which is published in Chicago, and is a standard paper showing the market quotations for Western rangers at Chicago, published daily except Sunday. Plaintiff's exhibits 1 to 14 inclusive are the daily Drovers Journals from October 7th to October 22nd, Sundays excluded.

[fol. 35] Whereupon the said documents were offered and received in evidence without objection, and are by this reference made

a part of this Bill of Exceptions, and portions thereof as marked thereon were thereupon admitted in evidence.

If cattle are loaded at Glasgow it ordinarily takes about 4 days to make the trip to Chicago within a reasonable time. If we had loaded out on Wednesday, October 2nd, we would have reached Chicago Sunday night with fair going. We did not load out of Glasgow on Wednesday, October 16th, by Noon, but did not finish until about 6 o'clock.

Q. That was your purpose in shipping cattle from here, so as to get them on the Monday morning market in Chicago.

A. It was. So had those cattle been transported out of Glasgow on October 2nd, and had reasonable handling, they would have been on the Chicago market on October 7th, the following Monday. I got the daily issue of the Chicago Drovers Journal and during this period studied them and ascertained the situation down there as to the market, watching the matter very closely.

Q. When the Cornwell cattle were being shipped you had a shipment along in the same band?

A. I did. From the information I have obtained by being in [fol. 36] Chicago and by studying the daily market reports, I know what the market was when those cattle arrived there on the day they did arrive, as compared with the market on October 7th. My information regarding the market conditions at Chicago is taken from the Journal and from the letters I received from the different commission firms. From the journals that I received I was able to tell what the market was. There was no difference between the journals and the letters I received from the commission houses; I have looked those journals over.

Q. What have you to say, then, as to whether, taking the period along the 7th of October, or the 8th or 9th, how did the market compare with the market when they actually arrived there,—say on the 21st,—was it higher or lower?

By Counsel for Defendant: I object to that on the ground that the papers here speak for themselves; the witness should be required to read that portion of the paper on which he relies, and he may then interpret that to the jury. Which objection was by the court overruled; to which ruling of the Court the defendant by his counsel then and there duly excepted; which said exception was thereupon duly noted and allowed, and is hereby preserved of record [fol. 37] Q. Tell us, Mr. Stephens, whether or not the market at the time these cattle actually arrived there; that is, the Cornwell cattle, had changed in any way from what it was say along the 7th 8th or 9th of October?

A. It was lower when the cattle arrived than when they should have arrived on the 7th or 8th of October. In shipping cattle from Glasgow to Chicago, cattle certainly do shrink; it is not possible to avoid this shrinkage en route. I have observed this in my experience and have weighed cattle, or seen them weighed and known of their being weighed before their being shipped, and I have known the weight again after they arrived there. This was for the purpose of trying to inform myself what would be the normal shrink

age. Taking these cattle as they were, for example, on the 2nd of October, 1918, and assuming they were loaded out on that date and had arrived in Chicago some time during Sunday night, October 16th, I would say they would shrink normally something like 75 pounds. I would say that the Cornwell cattle, from the time they were first put into the Wallett place on October 1st up to the time they were sold, shank at least 150 pounds, or an average of 75 pounds above the normal shrinkage en route. I would say they shrank about 75 pounds a head from the time they were out here at the Wallett place on the 1st of October until they were delivered here at the stock [fol. 38] yards at Glasgow on October 16th.

Q. Now then Mr. Stephens, I wish you would go through the Drovers Journals, Exhibits 1 to 14, inclusive, and tell the jury what, if anything, was the decrease in the market price of the Cornwell cattle, in your opinion, basing it on the market there, below what it would have been had the cattle arrived on the 7th, 8th or 9th of October. You can look through them again and explain what shows you a decrease for this class of cattle.

By Counsel for Defendant: I submit the witness can be asked to read portions of the Journal he deems pertinent, and can then say what that technical language means; the Journals speak for themselves; we therefore object to any testimony of the witness except upon his reading given portions of the Journal and then making any explanations he deems necessary.

Which said objection was by the Court overruled; to which ruling of the Court the defendant by his counsel then and there duly excepted; which said exception was thereupon duly noted and allowed and is hereby preserved of record.

A. These journals show that the market on the 7th, 8th and 9th of October was the same; there was no difference whatever in the market, and prime range steers at that time were selling for $16.75; [fol. 39] and on the 22nd, the day that our cattle were sold, prime steers were selling at $15.60 per hundredweight, a decrease of $1.15 per hundred. As regards the decrease in the other classes, such as dry cows, I didn't find that; but the report shows that inferior classes suffered a greater decline than the choice, so that that would be more than $1.15 per hundred; yes, sir. I would say everyone of the 2, 3 and 4-year-old steers were prime steers; yes, sir; on the average; yes, sir, they were prime in their class. I had some cattle on the market at the same time; I had no interest in the Cornwell cattle; $16.50 was tops on prime cattle on October 22nd; that is not the price Mr. Cornwell's cattle brought; there were no prime cattle noted on the 21st. The issue of the 22nd claims that the market was about something near the same on the 22nd as on the 21st and the 22nd the market was very druggy. Yes, sir, it is a fact in my experience that the Drovers Journal usually ties up a number of days together; they put Monday, Tuesday and Wednesday together so that you get your information, yes, sir, by going through a group of those papers.

Cross-examination:

On arrival at the Wallett place there were then about 460 head in the herd; the biggest part of them belonged to me and part of [fol. 40] them to Mr. Cornwell, and there were a few strays not included in the 460. We arrived at the Wallett place along in the afternoon of October 1st and then I went to Glasgow to see the agent. This was on October 1st, the day prior to the day we were going to ship first. I don't know that I can give you the exact words between the agent and myself; I went in there and informed him as he had requested us. He had requested us to come in the day before we would ship out and let him know whether or not we were in a position to ship that day, so that he would have plenty of time to order the power. When I arrived I told him the cattle were out some 5 or 6 miles from Glasgow, and that barring accidents we would be in the yards between 8 and 9 o'clock in the morning, and I thought we would be ready to load about Noon. The cattle I referred to were my cattle and Mr. Cornwell's cattle, and perhaps one or two neighbors who had thrown in a head or two. I did not ask him at that time where the cars were. I have told you the words that I used as near as I can. As regards giving anything clearer than that as to the exact conversation, I informed him that we were out five or six miles from Glasgow with the cattle preparing to bring them in the yards the next morning and I thought perhaps we would be ready to load by Noon. As to whether I meant by that [fol. 41] myself and Mr. Cornwell with the 460 head, I meant my cattle and Mr. Cornwell's and what other cattle that were put in there for shipment. The agent said they could not load us out, they had no cars. I asked what information he could give me—any idea as to when they might have them; yes, sir, the cars for myself and Mr. Cornwell, for our shipments. He said he could not give me any idea whatever. I suppose I then told him there was nothing left for me to do except to take them back to the ranch. I think I told him I was going to take the cattle back to the ranch. I will not undertake to give the exact words. I think I told him I would be obliged to take them back to the ranch as there was no other place to hold them. I meant by that the 460 head,—Mr. Cornwell's cattle and my cattle and other cattle. As regards what further conversation I had, as regards getting information at Tampico, he said that I had better come back to Glasgow Saturday and may be he would know or get some information by that time, and then he suggested probably it would be more convenient for me just to go over to Tampico and inquire over there. He said Mr. Fisher could call up the Chief Dispatcher and give me the available information as well as he could. I told him it would be more convenient to go to Tampico, and that I would do that. I went back to the [fol. 42] cattle that evening, and the next evening we took them back to my ranch; by "we" I mean the people handling them. That would be five or six of us,—myself and Mr. Cornwell and the employees, took the herd to this other place about 12 miles away, just North of my ranch. The following Saturday I took up with the

agent at Tampico the matter of having cars about Monday, going down to Tampico, which was about 7½ miles from where the cattle were being held. These cattle were scattered out, but there was none of them closer than 6 miles. I said to the agent that we had these cattle for shipment and had went to the Wallet place with them on the 1st for shipment and went on into Glasgow, and that Mr. Cahan had suggested that I take the matter up with him and for him to communicate with the dispatcher and find out when we could get cars. I asked him to communicate with the dispatcher and see if we could get cars. I presume he did then communicate with the dispatcher in an effort to see when we could get them. I figured I was doing business for anybody that had cattle in that bunch. I was acting for anybody that had cattle in that bunch. Where I have referred to cattle I refer not only to the Cornwell cattle, but all cattle that were in that herd. No strays were picked up, but [fol. 43] some of our neighbors had put in a head or two and asked us to look after them for them. I think I saw the agent at Tampico about half a day at that time; I stayed there until 7 o'clock that night. On Monday, October 14th, the agent said the cars would be on hand on Wednesday, October 16th. I also saw him on Saturday prior to this last Monday. On this second Saturday I went over about 2 o'clock and asked him if he had any information on the car proposition, and he said he had not, but would call up and see what he could get. As to whether there again I refer to the cars that myself and Mr. Cornwell wanted for the shipment of that entire herd of 460 animals, I refer to my cattle and to Mr. Cornwell's cattle and the other cattle that might have been placed in our possession. I could not say when these other people asked to ship their cattle in this herd also. The request would have been made certainly prior to the rounding up of the cattle. It would not be true that in the course of a rounding-up we would find other persons' cattle there and they would tell us to ship those along with ours.

Mr. Cornwell and myself were both in Glasgow when the car order was placed. I could not tell you why we both came to Glasgow. We were both down at the station when the order was put in. As to whether I put in the order or Mr. Cornwell put in the order, as far [fol. 44] as that is concerned Mr. Cornwell he put in the order for his cars and I put in the order for mine. As to how many animals I figured on shipping, I thought somewhere about 250 head. I could not tell how many animals I would have until I went out and cut them out. As to how many head I figured for Mr. Cornwell, I didn't figure on any for him. He did not report to me how many he wanted to ship. I had nothing to do with his order except to assist him in bringing the cattle in. As to how I reached this conclusion that I would have 250 animals, I knew practically how many cattle I had and a fair idea of the different ages. I knew I wanted to ship all steers over two years old and up, and some dry cows, and I had an idea what cars it would take. As to what conversation I had with the agent as regards getting cars, I told him I wanted 11 cars for my cattle; that is not a vague memory, but is my best recollection; but it is subject to correction if the facts are presented to me. The Corn-

well cattle and my cattle had been kept prior to that time about 35 miles from Glasgow, some further and some closer. They were running on the same range; no effort was made to separate them on the range. When we started to drive them in for the purpose of shipment the first time, no effort was then made to separate my cattle from his cattle. When we arrived at the Wallett place and found [fol. 45] we would not be able to get the cars, and drove back to the place near my ranch, no effort was made to separate the cattle; they were left together. As regards stating the conversation which I had with the agent regarding the cars; that is, my cars, I do not remember the conversation aside from the fact that I ordered those eleven cars. I told him how many cars I wanted for my cattle, and he said he wished to be cautious and not order any more cars than we were certain we would need, as we would have absolutely no trouble in getting cars. I heard Mr. Cornwell put in his order with the agent. He said we must not put in an order for more cars than we needed. I don't know whether he was addressing the two of us or one of us, but that was the statement he made when the cars were ordered. I don't remember whether he said it when I ordered my cars or when Mr. Cornwell ordered his, but it was the statement he made at that time. I told him that there had been several up in that part of the country that had asked me when I ordered cars for my cattle to order for them also, and I asked Mr. Cahan if it would be all right for me to put in an order for 3 or 4 cars for those people up there, but that I did not know how many cattle they were to ship, but I thought it would take 3 or 4 cars; I was going to bring down some Cornwell cattle and [fol. 46] my cattle, but not the other cattle; they asked me to order cars, but they would bring in their own cattle. I told the agent how many cars I wanted, but I don't know that I told him the number of cattle. When I finally loaded out I loaded out 11 cars. My recollection is Mr. Cornwell loaded out 9. I don't remember the size of those cars; they were different sizes. I think I stated to the agent the size of the cars I wanted,—I generally do. I am not positive what size I did ask for, but I think I always ask for 33-ft. cars.

Q. How many other animals were in this herd that you were in charge of and that you finally shipped out,—the Cornwell cattle and others, other than your cattle and Cornwell's cattle, to your best judgment?

A. That is, what was this entire shipment?

Q. Yes.

A. Or the ones that just come to the yard with our cattle?

Q. Did you turn any back?

A. I never turned any back. In the herd that we brought down to the Wallett place and then carried back to my ranch and finally loaded out, there may have been about 10 other cattle other than mine and Mr. Cornwell's; I don't believe there was as many as 10, but I would think somewhere between 5 and 10.

Defendant's exhibit A has my signature in the left-hand corner. [fol. 47] Looking at that exhibit I would say that that is not the car order that I placed with the agent, and that I have not confused the car order to which I refer with the car order of another year. As to

whether I signed defendant's exhibit A as the order for the cars on September 23rd to which I have been referring, I think that is my signature on Exhibit A. As to whether this is the order that was finally drawn up as a result of the conversation I had with the agent, I can't say. We never ordered cars for cattle to ship to St. Paul; our shipment was to Chicago. As to what was the occasion of my signing defendant's exhibit A, doubtless the agent asked me to.

Q. Is not that the car order which was made up as the result of your conversation with the agent and then signed by you as the car order?

A. You mean that was the order for our cars?

Q. Yes.

A. I don't know whether that is the order or not, we never ordered cars for St. Paul, and that is an order to ship to St. Paul. I never told the agent that Mr. Stephens and Cornwell wanted 24 33-ft. cars to load for St. Paul October 2nd. I never told him that 24 33-ft. cars were wanted. I told him I wanted 11 cars. I had nothing to [fol. 48] do with ordering Mr. Cornwell's cars. I was present at the time. As to whether after this conversation the agent wrote up this order and presented it to me, I don't know. That is no doubt my signature on defendant's exhibit A for that order, and he no doubt asked me to sign it. That is the time he was making out the order for the cars, if that is the order. As to whether it was made out immediately following the conversation, I don't know when it was made out; I can't tell you when it was signed; I can't tell you about what time it was signed in the course of the negotiations. I cannot give the jury any information as to how the signature Stephens & Cornwell, by Stephens, happens to be on there unless the agent asked me to sign it that way. It is not true that there was only one order put in showing cars ordered by Stephens and Cornwell signed by me. I had absolutely nothing to do with Mr. Cornwell's shipment outside of assisting in coming down together. I had nothing whatever to do with placing the order for him; I had nothing to do with his cattle. We were together and assisted each other. If something got down in the cars we helped each other. That is my signature on defendant's exhibit B and also on the back thereof.

Q. Is it not now true, after referring to defendant's exhibit B, [fol. 49] that you and Mr. Cornwell, by you, placed an order for 24 33-ft. stock cars to be furnished on October 2nd, and that afterwards on October 16th you and Mr. Cornwell made a joint shipment of your cattle to Chicago?

A. Well, I don't know what you would term a joint shipment; we went down on the same train.

Q. And one contract was signed covering the shipment?

A. I disremember about the contract; we signed everything he asked us to.

Q. And you signed Cornwell & Stephens, by Stephens?

A. I think so.

Q. And this is the contract on which you took those animals down to Chicago?

A. I don't know whether it is or not; I feel positive that is my signature, but I don't know whether that is the contract or not.

Q. You didn't ship any other cattle on October 16th than these,—you and Mr. Cornwell?

A. No, sir;

I have no further explanation to offer as regards exhibits A and B,—how they happen to be signed Stephens & Cornwell, by Stephens, or Cornwell & Stephens, by Stephens; or how these documents came to be executed; only I presume if they are the papers I signed with that shipment, that I was asked to sign them.

[fol. 50] In the Summer of 1918 the Cornwell cattle ranged something like 35 miles north of Glasgow; they could range 9 or 10 miles east and west and about 18 miles north and south if they wanted to. Part of them had always been on that range, others had come from South of the Missouri River opposite Culbertson; they were shipped in from Culbertson; I do not know how many were shipped in. It took us about two days to cut out my cattle and Mr. Cornwell's cattle from the entire herd rounded up. Before the cattle were rounded up I saw them several times that Summer; part of them nearly every week. We rounded them up and brought them near Mr. Cornwell's ranch and worked the herd up and cut out the beef. That ranch is located two and a half miles northeast of my ranch and 14 or 15 miles from Glasgow. The range that they had been on in the first place is right adjacent to Mr. Cornwell's ranch at one end, and the extreme North part would be 25 miles away. It might be said that we rounded them up at Mr. Cornwell's ranch, for we drove them from the north end of the ranch to Mr. Cornwell's ranch, picking up all the cattle we found in there on that range, and it was 15 miles from Glasgow on this ranch where we worked the entire bunch. We were going to begin our drive to Glasgow at a point about 15 miles out of Glasgow. [fol. 51] The rounding up was completed 15 miles from Glasgow and from this place we would make the first drive to this Wallett place, which is 5 or 6 miles from Glasgow. We gathered up the herd gradually and finally assembled them all at the end of the range on the Cornwell ranch, and then we intended to go to the Wallett place and then to Glasgow. The Cornwell ranch would be 10 or 11 miles from the Wallett place. Our plan was to take one day for that drive and the next drive go from the Wallett place to Glasgow, 5 or 6 miles. I could not say exactly what time it was that we left the Cornwell ranch, but it was in the forenoon. It might have been later than 10 o'clock, but I don't think it was earlier. It might have been approximately 9 o'clock. We arrived at the Wallett place some time in the afternoon. I could not give you the approximate time; I know we figured on getting them there before dark so that we would not have any trouble in getting them in this place and giving them water before they went out. On the way back from the Wallett place we left some time in the morning about something like 7 or 8 o'clock, because accommodations were not the best there, and arrived at my ranch sometime in the afternoon; I could not state about the time. It was 12 miles from the Wallett ranch to this place near my ranch. [fol. 52] I could not say how many hours we took to make that drive.

We let them take their time not feeding all of the way because we were in lanes a big part of the day. We did not take them to the Cornwell ranch from the Wallett place because there was no place to hold them there.

As to what the animals weighed on an average when we arrived at the Wallett place the first time, it is kind of a hard proposition guessing at 400 or 500 cattle at an average when they run from 2 to 5 years old. I figured that Mr. Cornwell's cattle, 213 head in number, lost 75 pounds per head over and above what they would have lost if they were shipped on October 2nd. What was the average weight of the cattle when they arrived at the Wallett place the first time is a big question. As to what I figure was the average weight, I don't care to answer that. I could guess at it, but it would be very uncertain. As to whether I could give you an approximately accurate judgment as to what was the average weight per head of that herd at the Wallett place the first time, I might and I might not. As to whether my estimate of the loss of 75 pounds is equally only a guess, the way I estimated it was, certain ages would average about so much, and another age would average probably so much, and then I made an average of the shrink, was the way I arrived at my [fol. 53] estimation. As to whether if I can make an accurate estimate and not a guess as to the average of different animals, I could also give an estimate of the weight of the different ages, I have not pretended to make an average estimate. I did not make an accurate average estimate of the shrinkage, but only to the best of my ability. It is from my experience in handling cattle. As to what I think the 4-year olds weighed on an average per head at the time they first arrived at the Wallett place, they weighed about 1,600 pounds—right close to it. I could not tell you what the 3-year olds weighed on an average, because I know what the 4-year olds weighed in Chicago, but I have a good idea what the shrinkage was. No, sir; I am not considering what they weighed in Chicago and then figuring out the shrinkage based on that weight. As to whether, aside from the weight at Chicago, I could, by looking at a 4-year old steer, guess its weight pretty accurately, I could come near it. As to whether I could do that with a 3-year old steer also, I have not shipped as many threes as fours. I believe I am pretty competent as the result of my experience to estimate the weight of a 2, 3 or 4-year old steer without the animal having gone to Chicago; yes, sir. As to putting myself on the Wallett place on October 1st, and without taking Chicago into consideration, looking over that herd and telling [fol. 54] you what I think Mr. Cornwell's 4-year old steers then weighed on October 1st; I could not do it, because I know what they weighed down there and would have to consider that. As to what the 3-year old steers weighed at the Wallett place the first time, they weighed from 1,250 to 1,300 pounds,—say 1,300 pounds for an average. I think the 2-year olds were better than 1,000 pounds, 1,000 pounds anyway. I think the cows weighed around 1,200 pounds. Mr. Cornwell's cattle were of the same ages as mine. Mr. Cornwell's stock was lighter than mine; his were of Hereford breeding and mine were shorthorns. I figure that his cows should have

weighed at the Chicago market, taking their condition at the Wallett place the first time they were there, if they had had a normal movement and had arrived in Chicago without any trouble in transit, something like 1,100 pounds; and his 2-year olds should have weighed nearly 1,000 pounds. If his 3-year olds had moved out of the Wallett place October 1st, and out of Glasgow October 2nd, and had a normal shrinkage in transit, they would have weighed in Chicago 1,275 pounds to 1,300 pounds, and the 4-year olds after a normal transit out of Glasgow on October 2nd, without any delays, if they had arrived in Chicago in the shape they should have arrived [fol. 55] without any trouble in transit, would have weighed 1,300 pounds or better by some thing like 25 pounds. They lost weight because we had to drive them back to this place near my ranch and keep them there and then bring them to the railroad, and the manner in which they were held. There was nothing else that would cause them not to weigh full weight on the Chicago market. Our transit from Glasgow to Chicago was all right. The trouble was we didn't get out of Glasgow when we expected to. I would say the 4-year olds in an ordinary transit from Glasgow to Chicago would lose about 100 pounds and the 3-year olds not quite so much,—say around 75 pounds, and the 2-year olds something like 50 pounds, and the cows that Mr. Cornwell had in that heard about 75 pounds. This would make an average loss of about 25 pounds a day in transit. As to how much they would lose in weight from the time rounding up on the range was started until the rounding up process was finished it would depend on the manner in which they were handled. In normal handling they would not lose anything to speak of. While being held at this place near my ranch awaiting cars, they would lose on an average something like 7 or 8 pounds. The 4-year olds lost from the time they arrived at the Wallett place to the time they arrived there the second time about 100 pounds, and the 3-year olds about 75 [fol. 56] pounds, and the 2-year olds 50 pounds, and the cows 75 pounds. This is the difference in their weight from the time they first arrived at the Wallett place to the time they arrived there the second time. As to what would make them lose this weight while they were being held near this ranch, the range conditions would do it for one thing, and another thing that they were continually trying to go back to their original range, and getting part of the way back there and then being driven back to where we were trying to hold them. The disposition of the animals to get back was not the sole cause of this loss of weight; it was the driving and the range conditions; they were uneasy and were continually trying to go back and every night we would find them from 6 to 8 miles on their way back from where we were holding them. I would not say how many got out 6 or 8 miles; some would stay where we left them and we always figured in the morning and get in the lead of them and push them all down to the water-hole. They wanted to get back to the herd from which they came. There were 460 in this bunch we were holding. Before that they had been on the range. I cannot tell you why they wanted to get back where the herd is almost 500 in number, but the fact that they do try to get back is not fanciful to any man that

knows anything about cattle. As to how wide that range was at this [fol. 57] place near my ranch where we were holding them, is a hard question to answer. They could go almost any distance west or north that they wanted to; that is, they could get away, but the range was about 3 miles wide and 8 miles long; the rest of it was not entirely open, but portions of it were.

Coming to the Chicago market, as regards the classifications they make on the Chicago market, apparently they need names, and so the animals are separated into different classes. As regards what classification the Cornwell stock would have received in Chicago if they had moved out of the Wallett place the first time on time, some of them would be considered choice and then they would have been separated into two or three different bunches, according to weight and flesh. There is such a classification on the Chicago market as "canners" and "cutters" and "stockers" and "feeders"; I do not know how many other classifications there are. The aged steers would have been classified on the Chicago market as choice, except possibly one or two; that would be true of the 4-year olds and the 5-year olds; the 3-year olds were good, so were the 2s; they were choice for that age. There might be a few exceptions as there always are, which few might be good only for feeders.

Coming back to the station where I was trying to get the cars, in [fol. 58] my conversation with the agent I was asking when the cars would arrive for this entire herd when I was talking with the agent at Tampico. I never put up any proposition to him for having cars for anything but the entire herd. I was supposed to be getting what information I could for that bunch of cattle for everybody that had cattle in it—for the 460 head and probably a few extra thrown in the bunch. I never put in any written order for cars at any time. Mr. Cornwell did not in my presence.

I cannot point to any Journal on the 7th that will show you where I get the figures of $16.75. The market on the 7th was the same as on the 8th and 9th. I testified to the market on the 7th because it was the same as on the 8th and 9th. There is nothing in the journal of October 7th which shows the Chicago prices for October 7th. I got the figures showing that the market on the 7th was $16.75, from the three papers—October 7th, 8th and 9th, turning to the issue of the 7th there is no choice cattle quoted in this issue; you have got to take all three papers, October 7th, 8th and 9th, into consideration on this proposition. I have marked on those three papers, and on the 22nd, the part that I say sustains my contention that the market was $16.75 on October 7th, and on the 22nd was $15.60 on choice cattle. There is really nothing there in the issue of the 7th. [fol 59] Some of the journals set forth representative sales of Western rangers. Where they are set forth they will show typical sales of cattle and prices at which cattle were selling, but I would not look at that column of representative sales to find out what cattle of the same weight as my cattle were selling for, because a steer that would weigh 1,200 pounds might bring several cents more than another steer of the same weight. I do not know the use to be made of the column marked "Representative Sales." I presume it is to give

a man an idea. Under representative sales they do not set forth prime cattle. I presume they will set forth in representative sales stuff that has been damaged, but I do not know this. I am not a subscriber to the Drovers Journal, and was not in September, October or November, 1918, but I was using it because nearly every day my commission firms were sending it to me. These cattle were known as Western range cattle.

Redirect examination:

I had nothing to do with the number of cars which Mr. Cornwell ordered; I was not interested in them in any way. When the cars were actually furnished by the company and loaded, Mr. Cornwell's cattle were loaded in the Cornwell cars; the cattle were separated,—his cattle from my cattle, in the yards, and I had no cattle [fol. 60] in his cars. When I came in from the Wallett ranch to make inquiry on the 1st of October, I was doing nothing in the matter other than to get information. After I obtained that information I conveyed it to Mr. Cornwell. Yes, sir; the same condition existed as regards the information I got from the agent at Tampico. No, sir. I didn't assume to bind Mr. Cornwell in any way or change any order he had given; no, sir.

Recross-examination:

As to whether I was sent down there as a representative of both of us to see about cars for this herd of 460 head, I considered I was going there for information for all parties that had cattle in the herd. As to whether I ever tendered to the railway company anything but the entire herd for shipment, I tendered my own. As to whether I called them up and asked them for cars for the entire herd, I explained it to Mr. Fisher and he called them up. I asked Mr. Fisher to communicate with the dispatcher and find out when we would get our cars, meaning myself and Mr. Cornwell and anybody else that had cattle in that herd; that is, when we would get the cars for that herd. I never put up the proposition to any representative of the railroad that I would ship my cattle if I could get a certain [fol. 61] number of cars and Mr. Cornwell could wait, and they never made any such proposition to us. As to whether is was always the proposition that all cars were to be there or none, that matter was never mentioned. I can't say as I remember who ordered the cars for the extra cattle; I did the talking about it when he asked us to order no more cars that we were certain we needed, and I told him about these neighbors that had spoke to me, and that when I ordered cars for myself to order cars for them. As to whether I ordered cars for them, I told him that and he included an order of three or four cars. I don't know whether you would call it that I ordered it or not. I told him that and he included three or four cars for them. As to whether he included it in my eleven, I told him I wanted eleven cars; I told him I thought from the number of people that spoke to me they would be able to load three or four cars. I never asked him to have three or four cars there; I left that to him. I had nothing to

do with getting my neighbors' animals outside of Mr. Cornwell's. I was not asked to look after their animals. After giving this information to the neighbors about three or four cars I did nothing further about filling these three or four cars. They drove their cattle to town, except 5 or 10 thrown in our herd. Others come in aside from myself and Mr. Cornwell; I can't say how many; there was more [fol. 62] than a carload but I can't say how many more. There were two or three loads I am quite positive. Mr. Jacobsen had cattle and Mr. McCormick,—he was not with us waiting for the cars; he was right with me when this order was given and he had asked me to order for them. My recollection is he told me he thought they would be able to load a car. I think Mr. McCormick shipped some and some others, though I am not positive, as this may have been another year, but I think it was that year.

Redirect examination:

The agent didn't agree to have the extra cars. I didn't put in any order for extra cars. I told him what had been requested of me and he said all right, we will order 3 or 4 for that purpose. That is all the conversation I had about that. As to my own cars; yes, sir, I put in an order for eleven and he told me he would furnish eleven. Yes, sir, I heard Mr. Cornwell order 9 and he told him he would furnish 9.

R. L. Cornwell, the plaintiff in the above entitled cause, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct examination:

I reside about 18 miles northwest of Glasgow, and north of Tam- [fol. 63] pico, having lived there about 29 years, engaged in the business of farming and ranching. I have had about 12 years in the matter of raising cattle upon the public range. I am the plaintiff in this case, and was the owner on September 23, 1918, of 65 head of 4-year old steers, 75 head of 3-year olds, 50 head of 2-year olds and 22 head of dry cows referred to in the complaint. I intended to ship them to Chicago from Glasgow over the railroad of the Great Northern Railway Company.

Q. Did you, or did you not, order any cars of any person who had charge of the transaction of business for the railroad?

A. I did.

Q. That was on the 23rd day of September, 1918, according to the admission in the pleadings. Is that agreeable to your recollection?

A. Yes, sir, it was on that date or about that date.

By Counsel for Defendant: If I may suggest to Counsel, we do not construe the pleadings the same on that.

Q. Do you recall, Mr. Cornwell, when it was, if at all, what day of the week it was that you requested cars?

A. No sir, I don't exactly. I was present at the railroad station there at the time that the order was made; I was at that time acquainted and know by sight the person in charge of the transaction [fol. 64] of the business of the railroad; Mr. Cahan was acting as agent there.

Q. Now, who was present, if anyone, at the time you ordered any cars, if you recall?

A. Mr. Stephens and Mr. Jacobsen.

Q. What, if anything, did you say to Mr. Cahan at that time with reference to ordering cars?

A. I told him I wanted 9 33-ft. cattle cars. He said he didn't think he could furnish them, because he said the time was too short.

Q. What time had you made a request for?

A. For the second day of October. I then asked him how much time he wanted and told him this should be time enough and told him it was on Wednesday, the 2nd. He said then that that was plenty of time. Yes, sir, I understood him to be laboring under the impression that it was the following Wednesday instead of Wednesday of the following week. When that was explained to him he said it would be plenty of time; the cars would be furnished. Yes, sir, I relied on the fact that the cars would be furnished at that time.

Q. Did you tell him at what point cars would be wanted?

A. I did,—Glasgow.

Q. Did you tell him to what point you were going to ship the cattle?

A. Yes sir, to the stock yards at Chicago. I didn't say any- [fol. 65] thing to him with respect to 33-ft. cars. After the conversation occurred I left the premises of the railroad. At this time—on September 23, 1918,—my cattle were running on the range between Buggy Creek and what we call the dry fork of the Porcupine, about 35 miles from the loading point—Glasgow.

Q. After you had been told by the agent of the railroad that you would get the cars on the 2nd of October, did you make any preparations toward getting the cattle to the railroad?

A. Yes, we started rounding them up and cutting them out, and brought them to the Wallett place, about 5 or 6 miles from Glasgow, getting there in the afternoon of October 1st. The cattle were then in good condition; most of them were of the Hereford strain. When about to be gathered up on the public range they were in prime condition; yes, sir, they were all filled out and fat; the 3-year olds were in prime condition for cattle of their class; the same is true of the 2-year olds and the cows. In getting them down to the Wallett place on the 1st of October, 1918, they had not been handled in such a way as to knock the fat off of them. They had been handled as gently and as carefully as they could be. As regards there being plenty of feed for them when we got them down there, there was plenty of feed for that one trip. We arrived at the Wallett place [fol. 66] along in the afternoon of October 1st. Mr. Stephens, L. McGuire, L. P. Christianson, Harry Stroud and myself were with

the cattle on the way to the Wallett place. After the cattle were got to the Wallett place we intended to simply hold them there until the next morning, and would then bring them into town. While at the Wallett place, Mr. Stephens gave information as to whether the cars would be available on the following day.

Q. Up to the time you obtained that information, had you relied on the agreement you had with Mr. Cahan?

A. Yes sir. Other than what I received from Mr. Stephens I had not received any information that the cars would not be available on the 2nd. I was familiar with the range conditions in and around Glasgow. There was not any part of the public range on which those cattle could be kept awaiting cars. As regards the most available and suitable range for that purpose, the nearest range at that time was about 18 miles from Glasgow, 2 miles north of Mr. Stephens' place on the west side of Buggy Creek; the cattle were taken to that range and left there in the afternoon of October 2nd. We handled them along as slowly as we could. At that time we had no idea when the cars would be furnished. The condition on the range on which the cattle were placed after we got them in the local-[fol. 67] ity of the Stephens ranch, was short. There was no range on which the cattle could be kept at that time which was any better than the one we put them on. There was one place where we could get water for them. In handling the cattle on that range, I, myself, had personal knowledge of how they were handled and taken care of. From my experience as a cattleman I would say the care given them was such as an ordinarily prudent person, under the circumstances, would give them,—yes, sir. It was necessary to keep them together in order to have them available and get them together whenever the cars were furnishd, because we could not do anything else. If we had turned them loose they would have gotten with other cattle and it would have been necessary to make another round-up. I did some of the work of keeping those cattle rounded up. I remained with the cattle until the morning of the 15th. During the handling of the cattle on that range awaiting cars, they were handled as carefully as cattle under such conditions can be handled, and such as an ordinarily prudent person would have handled them; yes, sir. Afterwards we drove the cattle towards Glasgow on the 15th and stopped at the Wallett place along in the afternoon of the 15th. We loaded them at Glasgow the next day—the 16th, Wednesday. Up to that time when we actually got the cattle into thes tock yards of the railroad, they had during all those [fol. 68] times been looked after in the same manner that I have testified that they were looked after prior to getting to the Wallett place, yes, sir. When they were gotten into the yards of the railroad on October 16th they were shrunken above what they were when they were on the Wallett place on October 1st, yes, sir; such shrinkage was noticeable. I have had about 12 years experience shipping stock cattle from the western ranges to Chicago over the line of railroad over which these cattle were shipped. During that period of time I have accompanied shipments of cattle practically every year. In 1918 I was familiar with what we call an ordinary

run from Glasgow to Chicago where the shipment is moved with considerable dispatch. Where cattle are loaded here at Glasgow on Wednesday, they should reach the stock yards at Chicago Sunday night sometime and should go on Monday's market. Yes, sir, that would be the purpose of leaving here on Wednesday. Cattle being carried over a railroad from Glasgow to Chicago will shrink to some extent. I have traveled over that railroad when the cattle got a reasonable run under ordinary conditions. I have by experiment or investigation reached a conclusion as to what would be a normal shrink, so-called, of a bunch of cattle of this class getting a normal run to Chicago. I would think it would be about 75 pounds per [fol. 69] head. As regards my opinion as to what was the average shring per head of these cattle of mine over and above the normal shrinkage at the time that they arrived in Chicago on October 21st was, 75 pounds per head; yes, sir, they suffered a shrink of 75 pounds per head on an average over and above the shrinkage that can't be avoided in shipping cattle. The cattle were prime of their class, most of them. This is true of practically all of them; there may have been odd ones. On the sale of the cattle at Chicago I received account sales from Clay-Robinson Company, showing what the cattle weighed and what they sold for. Plaintiff's exhibits 15 and 16 are the account sales which I received for this shipment of cattle.

Thereupon the said exhibits were offered and received in evidence, and are by this reference made a part of this Bill of Exceptions.

Q. Do you know what the state of the market was when these cattle arrived at the market and were placed on it, compared to what it was on the 7th, 8th or 9th of October, when they should have arrived in Chicago with a normal run?

By Counsel for Defendant: We object to that on the ground that the witness could not have known that of his own personal knowledge, [fol. 70] as he was not in Chicago at that time.

Which objection was by the Court overruled; to which ruling of the Court the defendant by his counsel then and there duly excepted; which said exception was thereupon duly noted and allowed and is hereby preserved of record.

A. Yes, sir, it had declined.

By Counsel for Defendant: You base your opinion on keeping in touch with the market from the Drovers Journal?

A. Yes,—and letters received from the commission houses.

Q. You have no personal knowledge yourself, except as received from the Drovers Journal and letters from the commission houses?

A. That is all.

By Counsel for Defendant: Now, we object further to the witness testifying, because he has shown that he does not know of his

own knowledge, but derives his information only from the Drovers Journal

Witness, continuing: I accompanied the shipment to Chicago. We arrived there Sunday night following the Wednesday of the 16th. I went over to the stock yards where cattle of this class were being sold on Monday morning, probably at 9 o'clock, and remained there until the business closed at 6 o'clock in the evening, and was over there the [fol. 71] following day at 7 o'clock, the next morning, and was there all that day. During that time that I was in the Union Stock Yards I know of sales of cattle being made on those days. I was present and saw sales of different classes of cattle, and made an investigation to determine if the market had declined since the early part of October—7th, 8th or 9th.

Q. Now, from such information as you obtained from that source, and any other sources, tell the jury whether or not the market had declined.

By Counsel for Defendant: We object to that question as calling for hearsay testimony; the persons with whom the witness has conversed have advised him of a difference between this market and the previous market, and his testimony would be hearsay, and he must produce the records, such as the journals, and testify from those parts from which he draws a conclusion there was a decline; and similarly, the commission letters. The witness is not qualified to answer the question as propounded, which clearly calls for hearsay testimony from the witness.

Which said objection was by the Court overruled; to which ruling of the Court the defendant by his counsel then and there duly excepted; which said exception was thereupon duly noted and allowed, [fol. 72] and is hereby preserved of record

A. It had declined. During the season preceding the time my cattle arrived in Chicago, I got information as to the markets at Chicago from what is known as the Chicago Daily Drovers Journal; so I used such information as they contained, yes, sir, in order to keep myself informed as to the state of the market. I could not say exactly for what period of time they had continued preceding the time of this shipment, but it must have been from the middle of August on—the time when western shipments usually started.

Q. Knowing the class of cattle which you had, and having before you the account sales showing what the cattle sold for, tell the jury how much per hundred pounds that class of cattle declined from the 7th, 8th or 9th of October until the time they arrived there on the 21st.

By Counsel for Defendant: I assume that we have a standing objection to this line of testimony.

By the Court: Yes, sir, certainly.

A. I would say they declined $1.15 to $1.25 per hundred on the average. The account sales show 237,480 pounds in that shipment;

no part of this claim has ever been paid to me by the United States Railroad Administration.

[fol. 73] Cross-examination:

I would say the 4-year old steers averaged around 1,500 pounds per head when they were first at the Wallett place, and the 3-year olds at the same time and place averaged about 1,350 pounds, and the 2-year olds about 1,250 pounds, and the cows the same as the 3-year old steers, or 1,350 pounds. The 4-year old steers while they were on the range immediately before we began rounding them up should have weighed practically the same as when they were at the Wallett place the first time. As regards whether the process of rounding them up and taking them down there would cause them to lose any weight, I would not say they would not lose any, but they would not lose very much. They ought not to have lost over ten or fifteen pounds. I would say the 2-year old steers averaged at Glasgow when they finally arrived there, 1,125 pounds, and the 4-year olds at the same time and place, 1,400 pounds, and the 3-year olds, 1,200 to 1,225 pounds, and the cows about the same thing. As regards comparing their weights after the cutting out at Glasgow and the loading on the cars, with their weights on the Wallett place when they arrived there the second time, it should have been practically the same. The trip from the Wallett place to the stock yards, and the cutting out process there prior to the loading, would probably [fol. 74] have resulted in shrinkage; it is hard to tell how much it would have amounted to; it would have amounted to a few pounds. I do not think it would amount to 10 or 15 pounds; it might have amounted to 5 pounds. I suppose the animals at Chicago got the usual fill they get. I suppose those weights include the fill. 61 of the steers sold for $15.15 per hundredweight. I base my opinion that there was a market decline there, in part upon the Drovers Journal which I was reading from day to day. The Journal of October 7th, under the heading of Western Rangers down to Butchers' Stock, shows the average condition as regards the prices of Western Rangers on October 7th, but it does not show particular classes of cattle. As to whether that statement as regards Western Rangers purports to show the condition of the market at that time, as far as giving and expressing it in general terms is concerned, it does not give any particular classes of cattle at that time on the day.

Q. Calling your attention to the part that I have marked, what have you to say as to this:—"Receipts were estimated at 8,000, standing 1,000 larger than a week ago and 1,500 less than the corresponding Monday a year ago. Thus far this season's offerings proved 57,200 larger than the same period last year and 130,700 [fol. 75] more than the corresponding time two years ago.

Several loads of steers landed at $14.85 to $15.25, and about 90 head in one lot scored $15.40. Around 16 loads of the Zimmerman offerings went at $14.00, while some others cleared at $14.25 to $14.75. A plain class was quite numerous at $12.00 to $12.50 and some of the inferior ones went much below $11.50. Cows of a

fair class sold at $9.00 to $9.35, while canners went down to $7.00, and only a choice grade of beef cows sold above $10.00."

Q. That statement from the Drovers Journal of October 7th would be a correct general statement of the market, would it not?

A. Yes, sir, on that day.

Q. When it says that several loads of steers landed at $14.85 to $15.25, and that 90 sold in one lot scored $15.40, that means the very best of the 8,000 head that arrived in Chicago that day?

A. You can take it as that.

Q. So if your 64 steers sold for $15.15, they received about the same figure as the several loads of steers that landed at $14.85 and $15.25 on October 7th, did they not?

A. My steers were not sold on the 7th.

Q. If they had been sold on the 7th, would you not think it would be doing well if you included them in that number, of the [fol. 76] whole bunch of 8,000 which arrived in Chicago which landed at $14.85 to $15.25?

A. I don't think they would have sold at that price.

Q. Now, the newspaper says that several loads of steers on the 7th landed at $14.85 to $15.25. That would include prime beef cattle, the best that you had at most, would it not?

A. I don't know whether it would or not.

Q. Would you say your cattle would be included in the 90 head out of the 8,000 that scored at $15.40?

A. No, sir, I would not say what list they would be included in from that paper. I would not expect them to be the best of the 8,000 that were shipped there from all over the country. Those 64 steers of mine were 4-year olds. As regards whether my cows would be called on that Chicago market, a fair class of cows, or would be the very best of the 8,000 animals received, I would think they were choice cows—most of them. As to whether I would tell the jury they were the best of the 8,000 that consisted of cows, or that they were a fair class of the cows that arrived that day, I would not mean to tell the jury that my stuff was superior to anything that arrived in Chicago, because I didn't see those that arrived that day. As to whether a fair class of cows means good stuff that arrives there this might be a fair class of canners or cutters or beef [fol. 77] cows. When the paper speaks of cows of a fair class I suppose that means an average good cow on the market for that day.

Q. Calling your attention to the journal for October 7th where it says, referring to cows, after what I have read in regard to steers, that "cows of a fair class sold at $9.00 and $9.35, while canners went down to $7.00, and only a choice grade of beef cows sold above $10.00."—nine of your cows sold for $11.25, did they not?

A. Yes, sir.

Q. And 8 more at $11.25, and 4 at $9.00, and 1 at $8.00?

A. Yes, sir.

Q. Comparing then this Journal of October 7th that I have marked, with your account sales, is it not true that you received a good average price for the cattle such as you had on October 22nd, compared to the price on October 7th?

A. Well, you are assuming that my cattle would have been sold on October 7th.

Q. If they had been sold on October 7th, would they not have brought substantially the same prices appearing here?

A. I don't know, because I contend there is no classes shown here.

Q. Can't you find from this Journal the facts in regard to the value of your animals if they had arrived on October 7th?

A. Well, I don't know whether I can or not.

[fol. 78] Q. How can you base an opinion as to the market values on the journal unless the journals contain facts by which you can reach that conclusion,—can you find anything in that journal of October 7th which, compared with your account sales, would show that if your animals had been sold on October 7th you would have gotten a better price on October 7th than is shown on your account sales?

A. I can't because I don't see that the classes of cattle are shown.

Q. It is true then, that from the Journal of October 7th you can find no statement that would be of assistance, in your judgment, in determining the price at which your animals should have been sold on October 7th?

A. If I knew the classes. If they had landed there on that date they would have probably sold under the day's quotations, probably the ones you have read here. I suppose that those quotations which you have read would be practically applicable to my animals. The 9 cows which are shown on the account sales, and 8 cows sold to Wilson, would probably be classed as a fair class in the condition in which they arrived and at the time they were sold on October 21st. I think that would be a fair designation of them, a fair class of cows. As regards those 6 steers that sold to the Independent for $13.25 being called special cattle, or plain class, or inferior cattle, [fol. 79] they must have been plain. As regards the 64 steers that sold for $13.85, they were classified as plain steers the day they were sold. They couldn't have been anything else; if they arrived there in good condition they would have been prime steers. As regards the 61 steers that sold for $15.15, they were plain when they arrived there. If they had arrived there on October 7th, the way they should have arrived, they would have been good cattle. As to whether they would have been good average cattle, or the very best of the 8,000, they would have been good average. As regards the 61 that were sold for $15.15 if they had arrived on October 7th in good condition, they would have been average good cattle on the market of October 7th. As regards the 104 steers that sold for $13.85, which I say sold as plain stuff on October 21st, if they had arrived in good condition on October 7th, how they would have been classed on October 7th. I have stated that they were all prime cattle of their class. As to whether comparing them with the whole of the 8,000 others I would mean that they were prime cattle, I don't know, because I didn't see the 8,000. As to whether I would say they would be average good cattle, if you follow that report I think you will find out that there were no prime ones there on October 7th; that might be the case that

on October 7th there would have been no prime beef cattle except [fol. 80] mine, if they had arrived there.

Q. Then it follows, does it not, that if your cattle had arrived there that day, you think they would have been the only prime beef cattle there that day?

A. They positively would have been.

Q. And your opinion as to loss of market as damages is based on the fact that your cattle would have been the very best of 8,000 that were there?

A. It is possible.

Q. Now, calling your attention to the 9 cows that you say if they had arrived in good condition on October 7th would have been designated a fair class, and calling your attention to the Journal that says as regards cows,—that cows of a fair class sold at $9.00 to $9.35,—you got $11.25 for them, didn't you?

A. That is what that report says.

Q. Then, on October 21st, with the shrinkage that they had sustained, and with the poor treatment that they had sustained, according to your judgment, they received what you class them, as a fair class, if they arrived on October 7th in good condition, they received $11.25, as compared with a market of $9.00 to $9.35, is not that correct?

A. Yes, sir; but I don't think that paper has any bearing on [fol. 81] that proposition, because you have got the other two papers there. As to whether, then, the Journal of October 7th, showing the market on October 7th, is of no assistance at all, I don't think it is in this particular instance. Getting away from this particular case, if you want to find the facts in regard to the market of October 7th, you don't use the Journal of October 7th, but use it in connection with the next two days. Of course, the Journal of October 7th purports in the first place to set forth the conditions on Monday. As to pointing out anything in the newspaper for Tuesday, October 8th, that would be of assistance in determining what was the market on Monday, October 7th, this Tuesday paper is just the same as the Monday paper; it does not designate any classes of cattle. As to whether the paper of Tuesday, October 8th, purports to show anything regarding the market of October 7th, it purports to show that the market was steady with Monday's market. The paper of October 8th is the paper that tells about the Tuesday market, and it compares it to the Monday market. As to whether it would be of assistance in giving the prices on Monday, it says the prices were steady and they have included Monday. As to whether the paper of Wednesday, October 9th, sets forth anything that enables me to reach a conclusion as to the market on Monday, October 7th, it shows what [fol. 82] would have been the market for good stuff, prime stuff. As to what there is there which shows the market on Monday, it shows one load of choice steers reached $16.75. These choice steers were sold on October 9th.

Q. In other words, to get a value on your animals of $16.75 a hundred, you can't find anything in the Monday paper which shows

that, but have to take a statement from Wednesday's paper as regards Wednesday's sales, do you not?

A. I think it indicates it right here (pointing to the Wednesday paper).

Q. You don't find anything in the Monday paper that justifies any conclusion that you didn't receive as the price of your animals on October 21st the same market that you would have received, according to that Monday paper of October 7th, if you had arrived there on October 7th?

A. Monday's paper, comparing prices with Tuesday's. In order to justify my claim that I didn't receive the same prices on October 21st that I would have received if my stuff had arrived on October 7th, in good condition, I have to take all three of those papers. As regards how many head were in that sale on Wednesday at $16.75, called a choice load, I think there was one lot, but I am not sure about that. I do not know whether that would mean about 20 head, for there are different sized cars and different numbers of cattle are [fol. 83] put in cars of different sizes.

As regards the average shrink from Glasgow to Chicago I would say the normal shrinkage would be 75 pounds a head on the entire bunch. I think my animals shrank in transit from Glasgow to Chicago 75 pounds. In that trip they were loaded on the cars at Glasgow and unloaded between Glasgow and St. Paul, and reloaded again and unloaded at New Brighton near St. Paul and kept confined in the yards, and then loaded out again and unloaded in the pens at Chicago. The process whereby they lose this 75 pounds may be outlined as follows: They are cut out at Glasgow and then loaded on the cars; the engine is moving the cars, then they pull out and go over the railroad. Other trains are passing them; passenger trains go by, scaring the animals; they arrive at intermediate loading points, are unloaded, kept confined there 10 or 15 hours in close pens and fed, and then reloaded on the cars again and carried some place near St. Paul and unloaded again, kept in the pens 24 hours and then reloaded, and then they come to Chicago. All this time they are on the railroad and are being passed by passenger trains and by other trains, which scares them, and at Chicago they are unloaded and worked around again there. That is nearly a correct statement of the facts of a normal transit. They are not held in pens 24 hours [fol. 84] along the road, however. The average detention might be 10 hours.

Coming now to the conditions from the time they arrived at the Wallett place the first time to the time they were returned there, I think they lost on an average 75 pounds. I think in driving them along carefully 15 miles back to the ranch where they were kept, and in holding them there for the period they were kept on the range—8 miles long and 3 miles wide, and in keeping them there properly, they lost as much as in the transit over the railroad. As to whether if animals are properly herded they can be kept on the range and lose no meat at all, this could not be done under the conditions that mine were kept.

As to when it was that I first ordered cars for this shipment, it is my recollection it was on September 23rd. Mr. Stephens, Mr. Jacobson and myself were present. The conversation was with Mr. Cahan the agent. I told him I wanted 9 33-ft. stock cars to load cattle for Chicago. As regards giving the conversation, I said on Wednesday, and he said that he didn't think they could furnish them because the time was not long enough, and I asked him how much time he wanted and told him he had 9 or 10 days. "Oh", he said, "you want them for next Wednesday;" I said, "Yes;" he said, "that is all right, that is plenty of time and they will furnish them." It was my impression that the first time when I ordered the 9 cars on Monday, he understood me to refer to two days later, and he said that the [fol. 85] time was too short, and when I told him it was the succeeding Wednesday, he said it was plenty of time and he would furnish the cars; he said they would furnish the cars; he said they had not fallen down on any of their cars up to that time, and would not fall down on that order. As to what the very words were which I used, I would not attempt to give them, as I don't know as I could. As to whether as a result of the words he used I understood him simply to estimate or give his opinion that they would probably be able to furnish the cars, or as to whether I understood him to say that the cars would be furnished, I understood him to say that the cars would be furnished. As to whether I understood that to be an opinion of his, that the dispatcher would probably be able to have them there, or as to whether I tell the jury that he told me he would promise me the cars would be there, I understood the cars would be there from his words.

As to whether I understood him to promise me that the cars would be there, or whether I understood simply that he would take it up and they might be there, he assured me the cars would be there. I took it that he promised me absolutely that the cars would be there. As to giving the words, he told us they had filled all orders before that, and he saw no reason why they could not fill that order of ours, and I took it from that that the cars would be there.

[fol. 86] As to what words he used from which I inferred that he promised to have the cars there, I have just told you. He said they filled all their orders; that they had not fallen down on any previous order, and that he knew of no reason why they would fall down on that, and he said the cars would be there.

As to who was in charge of the animals in rounding them up and herding them while waiting for cars; Harry Stroud and Mr. Stephens was with them all the time, and I was with them most of the time; those are practically all that were with the cattle during the time they were being held on the ranch out there.

As to who assisted in rounding them up in the first place,—there was Mr. Stephens, myself, Mr. Stroud, William Burke and Ed McGuire. I don't know whether Mr. Christianson was with them or not. I think there were more than that, but I don't remember. The round-up was finished at the corner of my ranch, and from there the drive was made to the Wallett place—11 or 12 miles distant, and in that drive Stephens, McGuire, Stroud, Christianson and myself were with

them. The same persons took them back to the range that took them down, and they were held on the open range near Mr. Stephens' ranch, about 2½ miles from my ranch. While being herded there they were in charge of myself, Mr. Stephens and Mr. Stroud only, and part of the time Mr. Stephens would go to Tampico about the [fol. 87] cars. I now refer to the entire herd of 460. As regards the hours that Mr. Stephens, Mr. Stroud and myself put in looking after that herd of 460 while it was being held awaiting cars; Mr. Stroud and myself put in practically all our time at it, working just in the day-time is about all. Then we would start out in the morning and go up the creek 7 or 8 miles and work the animals that had strayed there back to the water. Mr. Stroud and I would be at that work the greater part of the day and Mr. Stephens assisted quite a bit of the time and in the evening we would rest. I think Mr. Stephens also put in an order for cars at the time I was there; he ordered 11 cars. Mr. Jacobson was also there; it is my recollection that he put in an order for cars; I think he ordered one car. As to whether defendant's exhibit B is the livestock shipping contract under which the cattle I have referred to were finally billed out of Glasgow, I take it for granted that it is. As to whether this is the contract under which this shipment finally moved out, and on which return transportation was received on October 25, 1918, I presume it is. That is my signature acknowledging the receipt of a ticket back on October 25th, and similarly my signature as caretaker shown on the back of this. According to the contract, the entire herd of 460 was billed out in 20 cars under the name of Cornwell and Stephens.

By Mr. Veazey:

Q. And that was the contract under which it went out?
A. I presume it is.

By Counsel for Defendant: We offer that in evidence.

By Counsel for Plaintiff: Objected to on the ground there is no foundation for it, it is incompetent, irrelevant, and immaterial and not pertinent to any issue in this case.

By Counsel for Defendant: It is for consideration of the jury in [fol. 88] weighing his testimony, that he put in a separate order and that Mr. Stephens put in a separate order, when thereafter they billed it out in a joint order.

By the Court: I think it is admissible only for two purposes: one to reflect upon the contract for transportation and the other as proof of date of shipment which I believe is not at issue.

By Counsel for Defendant: No.

By the Court: You are offering it on the theory to test the reliability of the witness as to the contract for transportation.

By Counsel for Defendant: And what was the order for cars?

Thereupon said exhibit was admitted in evidence to which ruling of the court in admitting the same in evidence said plaintiff excepted, which exception is preserved for review.

Witness, continuing: As to why it was, if I had a separate order for 9 cars when the shipment was billed out it was billed out in the name of Stephens and Cornwell in the form of 20 cars, I don't know.

Q. Are you able to give any explanation as to why, if a single order for 9 cars was placed by you and a single order for 11 cars was placed by Mr. Stephens, yet when you billed them out, you billed out the whole 20 cars under the name of Stephens and Cornwell?

Which question was objected to by the plaintiff as assuming a state of facts not shown by the evidence, and on the ground that it does not go to the matter of reflecting upon the credibility of the witness respecting his testimony concerning the order. Which objection was by the Court sustained; to which ruling of the Court the defendant by his counsel then and there duly excepted; which said exception was thereupon duly noted and allowed and is hereby preserved of record.

[fol. 89] Witness, continuing: It is not a fact that I did not order the cars for this shipment but that Mr. Stephens ordered them. It is not a fact that no order was placed by me for 9 cars and that no order was placed by Mr. Stephens for 11 cars. It is not a fact that the entire order was a single order placed by Mr. Stephens for twenty-four 33-ft. cars in the name of Stephens and Cornwell. This conversation with Mr. Cahan took place in the freight-house, in the office. I suppose it was in the office,—the place where they do their business. I could not say as to whether it was inside the agent's office, or where; I could not say positively what time of day it took place, but it is my recollection that it was in the afternoon sometime. I could not state posttively about what time in the afternoon it occurred. No writing was then signed up constituting the car order to my knowledge.

Redirect examination:

It was in the afternoon of the 14th that we begun rounding up the cattle for the purpose of bringing them back to the railroad the second time so as to load them out on the 16th. That would be Monday, Wednesday being the 16th. We got them all in shape to be able to move them in the early morning of the 15th. As to what time in the morning it was on the 15th that we began the actual moving of them towards the Wallett place, we were out and after [fol. 90] them as soon as we could see in the morning. Daylight probably comes around 5 o'clock at that time. It was 12 or 13 miles in moving them from the point where we had rounded them up on the 14th, down to the Wallett place. They were not driven any other way during that period than in a careful manner.

In estimating the normal shrink from Glasgow to Chicago at 75 pounds per head, I take into consideration the fact that the animals were filled in Chicago after they got in there before they go on the market. The market on Monday and Tuesday was practically the same these papers claim. As to whether I am familiar with the terms used in the Drovers Journal concerning market conditions, and with what the term "steady" with another day means, I presume the

market was the same as it had been on some other day. I think I find in the Journal of the 9th something that indicates what the market was on Wednesday, the 9th, compared with Tuesday's market preceding, and with Monday preceding. It says that "range steers were uneven today, some of the best sold steady with Tuesday." As to whether the paper for Tuesday shows anything that shows Tuesday's market for choice steers steady with Monday, it says fair to good range steers sold strong, and 10 to 15c higher than Monday. Yes, sir, it is by the use of the three days' issues of the Drovers Journal [fol. 91] that I arrived at the Monday's market for choice beef stock such as was in this shipment as it would have been had it gone forward the time cars were ordered in the first instance on October 2nd. As regards the questions which were asked me in regard to the account sales and how the commission firm of Clay-Robinson Company graded the different grades of cattle, and where I stated that some were fair, and so on, I referred to the condition of the cattle at the time they actually arrived there and the condition in which they were then, and not to the time the cattle were ready for shipment the first time. I referred to their condition after the period of shrinkage, and so on, respecting the delay; yes, sir.

Recross-examination:

As to whether I testified as to the classification that I would make of the animals if they had arrived on October 7th in good condition, I think I told you I was testifying to the condition that they actually did arrive in. I presume I testified that the 8 or 9 cows that were sold to Wilson, if they had arrived on October 7th in good condition, would have been classified as a fair class. As to whether if the animals had arrived on Monday, October 7th, I would contend that they would have been the very best of the 8,000 head that did arrive there, I would contend the most of them would have been the best [fol. 92] according to these reports. If the cows had arrived in Chicago on October 7th in good condition they would have been classified as good cows. There were a few big-jaws, which would be called culls. I think the report shows that 4 cuts were made. I couldn't say if those would be the cuts I would have made if I were classifying them. I don't know as I said there were any culls at the Wallett place the first time. I said the cattle were prime, all but a few; there might have been a few that were not prime. At the Wallett place I might have made two cuts or might have made more. I would not have called the best out of the cows a fair class of cows, but prime cows. As to whether, using the market terms set forth in the Journal, I would call them a fair class of cows, I would say the top of them would have been prime cows. As regards the paper of Tuesday, October 22nd, I can't find anything there referring to the date of October 7th. I didn't look at the date of the paper; as to whether the paper of Tuesday, October 8th, shows anything which represents Monday's market; prices were quoted steady for the better grades and generally weaker on other kinds. As to whether the better class means all above the inferior grades, I don't know whether

it does or not. It does not mean everything above what is plain or poor, necessarily. I take it there was no prime cattle on the market [fol. 93] either Monday or Tuesday. I assume they are alluding to the better grades that happened to be on the market that day. As to how many grades I would have made in the steers if they had arrived in Chicago on October 7th in good condition, I could not say as to that. The rounding up of the cattle and driving them to the railroad the last time, was begun on Monday afternoon, the 14th. I prefer Wednesday as a shipping day to any other day under certain conditions. As to whether I like to get on the Monday market depends on the kind of stock I am shipping.

Rush Jacobson, being first duly sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination:

I reside here in Glasgow; during the past few years I have been living about 15 miles north of Glasgow. In the year 1918, and other years, I had a few stock out there; I knew the plaintiff in 1918 and in the month of September of that year was acquainted with H. R. Cahan, the agent on the railroad at Glasgow. I saw him on September 23, 1918, and saw Mr. Cornwell at the same place; this was up at the freight office. I heard Mr. Cornwell say something to Mr. Cahan with reference to furnishing stock cars. Mr. Cornwell went up to order some cars, told Mr. Cahan he wanted—I think, 9 cars; he told him he wanted the cars for Wednesday. Mr. Cahan said it [fol. 94] was too short notice. Mr. Cornwell then told him he didn't want them for the coming Wednesday, but for a week from the coming Wednesday, and Mr. Cahan then said he could furnish the cars on the coming Wednesday.

Cross-examination:

He said he could furnish him the cars on the coming Wednesday. I do not remember his exact words. As to detailing to the jury as nearly as possible the conversation that took place there, so that the jury can draw a conclusion as to what was meant, I cannot give it entirely or state the misunderstanding. The agent thought he wanted them for Wednesday, and he really wanted them for a week from the coming Wednesday. When he explained that, Mr. Cahan first said he could not get the cars that soon, that that was too short notice, and then Mr. Cornwell said he didn't want them for the coming Wednesday, but wanted them a week from the coming Wednesday, and Mr. Cahan then said that would give him more time and he would have time to get the cars. As to whether what he said was that that would give him more time and would give him time to get the cars, he said he would have the cars there. As to whether Mr. Cahan undertook to promise that the cars would be there, or whether he said to Mr. Cornwell he would put in the order and he assumed that

that would be sufficient time to get the cars, I didn't hear him say [fol. 95] anything about putting in the order; he didn't say "promise,"—he said "I will have the cars." As to whether he said that would give enough time to get the cars here, I didn't hear him say nothing like that. He said the first time, he could not get the cars for the coming Wednesday,—that he could not get the cars in two days, that that would be too short notice. Then when the time was changed he told Mr. Cornwell he thought he could have the cars Wednesday. As to whether what he said was that he thought he would have the cars, he didn't say he thought; he said he would have the cars here Wednesday; I didn't hear him use the word "promise." The matter came up in connection with what was probably a sufficient notice. I myself ordered a car at the same time and Mr. Stephens ordered more cars. I am sure I was there when Mr. Stephens and Mr. Cornwell were there, and that it was the same time that I put in my order; I did not sign my order for cars; I didn't sign anything; I don't remember signing anything. No relative of mine, or my father, put in any order for cars for me that year. He went up after we had the cattle in town here and found we could not get cars for the 2nd, then he went up. We first had the cattle in here on October 1st. I couldn't say whether that was the first time my father saw the agent in regard to our cattle. My father did not [fol. 96] at any time tell me he had put in an order for cars for the Jacobson cattle. He told me after I had been up there once before to see Mr. Cahan, to get cars, for some time when the rest of the neighbors were going to ship. My father was in town on September 23rd. I reported to him on September 23rd that I had ordered cars. As to whether I saw him at any time until about October 1st when the cattle were in, I think I did, but I don't know of any time that I could mention. He found out on October 2nd that he would not be able to ship, and that was the occasion of his seeing the agent. The first time I ever discussed the placing of this order was about a week or two weeks ago.

Redirect examination:

My father's cattle came in October 1st because we expected to have cars for them; the cars had been promised to us; that promise was made on September 23rd.

Thereupon the witnesses Louis Christianson, Arthur White, Roy Jones, Roy Black, William Jaycox, and John Survant testified for the plaintiff, sometimes in accord with, and in some particulars at variance with some of the various matters testified to by the witness Stephens, and by the plaintiff as a witness in his own behalf on the issue of the care which the cattle should have received while awaiting cars, and of the shrink which the witnesses said the [fol. 97] cattle would sustain in weight under the circumstances narrated by said witness Stephens and the said plaintiff testifying in his own behalf.

Thereupon the plaintiff read from the Farmers & Drovers Journal offered in evidence as aforesaid the following portions:

EVIDENCE: PLAINTIFF'S EXHIBIT 3

Daily Drovers' Journal for October 9th

'Range steers were uneven today. Some of the best sold steady with Tuesday, but many called those below good grade and not carrying much weight generally 10 to 15 cents lower than the best time yesterday. She stock was not materially changed, although demand was not very urgent. One load of choice steers reached $16.75, while two loads of other offerings scored $15.75. A good kind went at $14.50 to $15.00 where they were not very heavy. Common and underweight kinds went below $13.50, with some down to $10.50 and canner kinds even lower. Seven loads of the Hemrick cows reached $11.00 and several other bunches cleared at $9.25 to $9.75. Some Dakotas of a medium class landed at $8.75 and plainer stock sold at $8.25 to $8.60, with canners at $7.25. Receipts were about the same as a week ago, standing 500 short of a year ago and twice as large as corresponding Wednesday two years ago. Thus far this week offerings were 1,000 smaller than a week ago, 2,500 larger than [fol. 98] a year ago and 8,500 larger than two years ago. Offerings for the season to date footed 61,200 more than a year ago and 137,200 larger than two years ago."

EVIDENCE: PLAINTIFF'S EXHIBIT 2

Daily Drovers' Journal for October 8th

"Western rangers not much changed from previous day. Trade has relative fair action. Western Rangers. Trade was rather uneven for western rangers today. In some cases there was fair action to the market in comparison to native offerings, while in other instances the market was rather draggy. Prices were called steady for the better grades and generally weaker on other kinds. Some steers sold at $16.10, while others went around $14.00 to $15.00, with plain kinds down to $10.00. Western butcher stock sold with fair action at prices little changed from Monday. Receipts today were estimated at 7,500, being 2,000 less than a week ago, 4,500 more than a year ago and 3,500 more than two years ago. So far this week the arrivals total 15,500, or 1,000 less than same days last week, 3,000 more than a year ago and 5,000 more than two years ago."

EVIDENCE: PLAINTIFF'S EXHIBIT 1

Daily Drovers' Journal for October 7th

"Western rangers mostly steady. Stockers and feeders weak t
26c lower, with a liberal supply available. Although buyers bi
[fol. 99] lower for western rangers on the first few rounds, the bul
of the steers sold steady with late last week. Trade became mode
ately active, but there was no urgency to the demand at any time
She stock was uneven, but most lots sold steady, although the trad
had a weak undertone. Receipts were estimated at 8,000, standin
1,000 larger than a week ago and 1,500 less than corresponding Mon
day a year ago. Thus far this season offerings proved 57,200 large
than same period last year and 130,700 more than correspondin
time two years ago. Several loads of steers landed at $14.85 to $15.2
and about 90 head in one lot scored $15.40. Around 16 loads o
the Zimmerman offerings went at $14.00, while some others cleare
at $14.25 to $14.75. A plain class was quite numerous at $12.00 t
$12.50 and some of the inferior ones went much below $11.50 Cow
of a fair class sold at $9.00 to $9.35 while canners went down to $7.0
and only a choice grade of beef cows sold about $10.00."

EVIDENCE: PLAINTIFF'S EXHIBIT 14

Daily Drovers' Journal of Tuesday, October 22nd

"Western Rangers. While the fair to good weighty range steers
sold strong and often 10 to 15c higher than Monday the other grades
were largely steady and trade proved unusually dull on the common
[fol. 100] trashy kinds, with the prices on a "catch-as-catch-can"
basis from start to finish. She stock ruled steady to strong and sold
with fair freedom. Four loads of comparatively heavy steers went
at $15.60 and some others reached $15.00. Several bunches cleared
at $14.00 to $14.25, but a good share of the run consisted of offerings
at $10.00 to $12.50 while some trashy light stuff went below $9.00.
Three head of prime weighty cows made $12.50, while load lots
scored $10.25 and numerous consignments cleared at $9.00 to $9.50,
with a plain grade around $8.00. Some cutters made $7.75 and
canners sold usually around $6.25. Receipts were the same as the
previous Tuesday and proved 3,500 larger than a week ago. Two
days' arrivals stood 1,500 larger than a week earlier and nearly twice
as large as a year ago. Offerings for the season were 67,200 larger
than a year ago, and 160,000 larger than two years ago."

EVIDENCE: PLAINTIFF'S EXHIBIT 12

Daily Drovers' Journal of Monday, October 21st

"Western Rangers. General quality of rangers, especially the steers, was poorest of the season and makes traders believe that today's run will be the last liberal one of the season. While some of the early sales were steady, many of the late transactions showed 10 to 15c decline. Up to noon there were some common light westerns that [fol. 101] never had a bid, so indifferent and limited was the demand. She stock of a good type went about steady and probably a little firm, but the other grades were weak to a little lower. A few steers sold at $13.50 to $14.25, but the general bulk consisted of offerings which had to sell *be-* between $10.50 and $12.50, while sales were not uncommon below $10.00. A fairly good grade of cows went at $9.50 and better ones were held up around $11.00, while canners went at $6.00 to $6.25. Receipts were 1,500 larger than a week ago, twice as large as a year ago and 4,500 larger than corresponding Monday two years ago. Offerings for the season to date were 63,700 larger than same period last year, and 159,500 more than two years ago.

Plaintiff rests.

By Counsel for Defendant: Might I inquire of counsel at this time whether the action is based on an express contract, or failure to furnish cars in a reasonable time?

By Counsel for Plaintiff: The action is based on both.

DEFENDANT'S CASE

H. R. CAHAN, being first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct examination:

During the months of September and October, 1918, I was agent [fol. 102] of the defendant, Director General of Railroads at Glasgow, Montana, in charge of the station at Glasgow. I am acquainted with the plaintiff and with James R. Stephens, who has testified. I had no conversation with the plaintiff at Glasgow, Montana, on September 23, 1918. No, sir, he did not place any order with me for nine 33-ft. stock cars, or any cars whatever. Defendant's exhibit A is not in my handwriting. It is in the handwriting of N. R. Underwood, who was the assistant cashier at Glasgow at that time. I did not at any time promise Mr. Cornwell the plaintiff, that I would furnish him any cars. My duties in reference to placing orders for stock cars was to accept a written order for the number of cars wanted and have the date given that they were wanted. After that we placed the order with the chief dispatcher. I did not have anything to do with reference to distributing or placing the cars in any way until

after they had been assigned to my station by the chief dispatcher. I had charge of the orders and the custody of the orders and other writings there in the office at Glasgow. Afterwards I saw that order; I filed it at the telegraph office where our wire work is handled to Wolf Point wiring it to the chief dispatcher. Subsequently to September 23rd cattle were shipped by Stephens and Cornwell from *from* Glasgow. Defendant's exhibit B is a livestock contract. I was pres- [fol. 103] ent when that contract was signed; Mr. Underwood prepared it. Mr. Stephens, Mr. Underwood and myself signed it; I was present when Mr. Stephens signed the contract; it was signed on October 16, 1918. That is the contract that was signed up for the shipment of cattle made by Stephens and Cornwell on that date. They are the cattle that were shipped on that contract pursuant to the order made on September 23rd.

Defendant's exhibit C is the order for cars placed by C. J. O. Jacobson on September 24th; I handled that order. My signature is attached to that order. It is the only order made by C. J. O. Jacobson in September, 1918. I did not have any other order from Mr. Jacobson during the month of September, 1918.

Thereupon said defendant's exhibit C was offered and received in evidence, and is by this reference made a part of this bill of exceptions.

Witness, continuing: As regards any converastion had with Mr. Stephens with reference to signing any papers during the signing up of the contract of shipment, he was requested to sign the contract and the 36-hour release. He did not sign a 36-hour release; the 36-hour release was presented to him and he was asked to sign it.

Cross-examination:

I reside now in Spokane, Washington, as a traveling auditor for [fol. 104] the Great Northern. I have been employed on the Great Northern since June, 1913, continually. I took charge of the agency at Glasgow on November 17, 1917, and remained in that work until July 14, 1920. During all that time I was in charge of the railroad's business at this point. In the season of 1918 I had a considerable number of orders for stock cars, and a considerable number of cars for other shipments of other kinds; I don't pretend to carry in my mind for any given length of time what conversation occurred at the time an order is placed. As to whether I could not do it with all the items of business a railroad has to look after, I could not without reference to my records. I did look up the records in the office concerning this case; I did that yesterday. As to whether from the time of the month of September, 1918, until yesterday I made no investigation of the records in the office of which I formerly had had charge. I can't state positively that that is so. As to whether I have any recollection at this time of ever having searched the Glasgow office records for the purpose of producing any records relating to this lawsuit until yesterday I rather think I have gone through my records for information relative to this shipment prior

to that. I can't say when I did that; my recollection in regard to that is nothing more than a general hazy idea. No sir, I do not [fol. 105] know when I did it, or what any search recalled to my memory. I was not there when the order was given by Mr. Cornwell for cars.

Q. You absolutely know nothing about what cars he did order, of your personal knowledge?

A. I don't quite understand what information you want to get.

Q. Personal knowledge, of course, is matters which we have within ourselves by reason of our senses; that is, seeing, tasting, smelling, and so on; now, you have absolutely no personal knowledge respecting the Cornwell order, have you, as far as the giving of the order for cars is concerned?

A. I did not see or hear him place the order.

Q. Then you have no knowledge, which we call your personal knowledge, respecting the matter; is that the idea?

A. No.

Q. You don't deny that Cornwell ordered 9 cars on the 23rd of September, 1918, do you?

A. I maintain that our records don't indicate it.

Q. I am talking of your own knowledge; you don't deny that Lee Cornwell ordered 9 cars for shipment of stock on October 2nd, do you?

A. No.

Q. And you don't deny that James R. Stephens, on the same day, ordered 11 cars for shipment of stock do you?

[fol. 106] A. No. I know Rush Jacobson; he is different from C. J. O. Jacobson.

Q. You don't deny that Rush Jacobson did order one stock car for shipment on October 2nd, 1918, do you?

A. There is a small possibility of such an order having been placed. I mean that the orders are taken by men under my supervision and are turned over to me and placed on my desk after the orders are taken. After an order was taken it was the duty of some employee to turn the order over to me after it was taken. At the time C. J. O. Jacobson went to my office on September 24th, he did not refer to any request having theretofore been made by anybody for cars for a shipment of cattle. I am positive about that. As to how I recall the conversation with all the multitude of conversations I have had, I do it by reference to my records.

Q. All right, there is one of the records; what does that recall to you of any conversation Rush Jacobson had with you on the 23rd of September, 1918, or did not have?

A. None.

Q. What other records have you then which would recall to you a conversation you may have had with Rush Jacobson on the 23rd of September, 1918, relative to an order for a car?

A. I did not understand you requested a conversation held with Rush Jacobson.

[fol. 107] Q. That is what I am talking about. I don't care with whom the conversation was,—you have nothing in your office at all

by way of records which would enable you to recall whether or not a man did, or did not, have a conversation with you?

A. No.

Q. Now, taking up the so-called order for Stephens and Cornwell cars, as I understand you, all you know about such an order, was the original and a duplicate of a telegram exchanged between your office and the Chief Dispatcher's office then at Wolf Point; is that the idea?

A. Yes. I don't know, as a matter of fact, that Lee Cornwell didn't order any cars to ship cattle to South St. Paul. As to whether I know where he wanted to ship cattle, I have an idea. No, sir, my idea was not to South St. Paul. Somebody corrected or altered these telegrams, yes, sir. I do not know when this alteration occurred, no, sir.

Q. You notice that alteration on the two of them different, written in different places, do you not, that on the original, September was erased, whereas on the duplicate the word "September" was simply marked over; you can see that, don't you?

A. I do not; I do not naturally erase on that message.

[fol. 108] Q. Is not that an erasure, or written over September; don't you think a man tried to erase it?

A. I do not. Yes, sir, I notice a different line running through September in that, and I notice over here a line running through September, marked October up above it. No, sir, I don't know anything about when that was made. No, sir, in handling car orders while I was in charge of this work, I did not as a rule if I happened to have a bunch of orders together, simply give a list of the names of the persons.

Q. In handling car orders while you were in charge of this work, didn't you as a rule if you happened to have a bunch of orders together, simply give a list of the names of the persons, and isn't that all you ever intend to do in giving an order to the chief dispatcher?

A. No. It is true that in handling our telegraph business our instructions were to make them as brief as possible, and we were not permitted to use a dozen or so words to express an idea that could be expressed in two or three words. When I got a bunch of orders for cars I did not simply state that I wanted a certain number of cars for different shippers. I wired a separate order for each and every order received. The employees under me running the station did likewise. I know this by the orders having been handld through [fol. 109] the office on numerous occasions. Yes, sir, I am simply testifying as to a practice, and not as to individual items. Yes, sir. that is all that I can do at this time. No, sir, independently of the records I could not give you any information respecting the matter at all.

Redirect examination:

No, sir, I did not ever file any order for cars for Mr. R. L. Cornwell, the plaintiff here, in the month of September or October, 1918. I have looked over my car orders for those months. I left the Glasgow station in July, 1920, and have not been in charge of the records since that date. I have made an examination of those rec-

ords since I came back. I found the records in the same condition that I left them. There was a file of stock car orders and messages pertaining to stock car orders in one file for the year 1918. When I examined them recently I found them in the same condition and shape as when I left them. In going through those records, no, sir, I did not find any other orders for Stephens and Cornwell or for Cornwell and Stephens or for Stephens or for Cornwell, than what I have testified to for September and October, 1918. I never knew that Mr. Cornwell, the plaintiff, was interested in 9 cars of that shipment, or Mr. Stephens in 11 cars of that shipment until I came here [fol. 110] for this trial. I was present at the time of the loading of this shipment out of Glasgow stock yards and was in charge of the loading. There were 20 cars loaded,—fourteen 36-ft. cars, one 44-ft. car and five 33-ft. cars.

Recross examination:

As regards my having an independent recollection of the length of cars, or my simply getting it by picking out the car numbers and knowing under the practice that railroad cars of a certain series, bearing certain numbers, are so long, I arrive at the length of the cars by referring to the equipment register. As to whether I recollect that at a given time a certain man was loading 33-ft. cars at the Glasgow yards, I do by reference to my records. When I find a car number I know from reference to other records that that series of cars bearing that number is 33 or 36 feet long. As to whether that is the only way I am able to testify at this time as to the number of cars of a certain length, I don't fully understand what information you want. As to whether I recall whether on the 16th day of October there were fourteen 36-ft. cars loaded at the Glasgow stock yards by anybody as a matter of memory, I recall having loaded the cars and made records showing the numbers of those cars. Yes, sir, I do recall that some cars were loaded. As to when I get down to the point of testifying about the length of cars I do that solely by [fol. 111] reference to some records, I do. As to whether I have no recollection as to how many 36-ft. or how many 44-ft. or how many 33-ft. cars there were, as a matter of memory, I can't picture those cars right at this time. As to whether you do not expect me to do that, and whether that is the point you are trying to establish, that my memory is not good enough to recall items of that character, I could recall whether there was a number of foreign cars at the stock yards or not. As to whether on the 23rd of September there were any PCC&StL. cattle cars at the stock yards, I could not recall the names and initials of all the cars, but I can recall there were cars from foreign lines at the stock yards on that date. Yes, sir, I can recall that there were some down there, but what they were I can't recall now.

N. P. Underwood, being first duly sworn as a witness on the part of the defendant, testified as follows:

Direct examination:

I was in the employ of the Director General of Railroads at Glasgow, Montana, during the months of September and October, 1918, as assistant cashier; I am acquainted with the plaintiff, R. L. Cornwell, and was acquainted with him in the month of September, 1918, and also with James R. Stephens during the same period. They [fol. 112] called at my office on September 23rd, 1918; the first time they called was around 9 o'clock in the morning. I don't remember all the people that called, only that Mr. Cornwell and Mr. Stephens were in the bunch. I don't remember the other gentlemen that were with them. As to what took place at that time, they inquired for Mr. Cahan and I informed them he was not in at that time, and they left. As regards what took place subsequent to that time on that date,—possibly a half hour or hour afterwards, they returned, or at least Mr. Stephens came in and come to the cage where I was working and informed me he wished to place an order for cars. I picked up a clip and put a carbon in it and placed the order as he gave it to me. Defendant's exhibit A is in my handwriting. The signature shown on it is Mr. Stephens' signature; that was prepared by me at his request. His request was to furnish him 24 33-ft. stock cars for loading October 2nd, for South St. Paul, and at the same time he was talking about shipping to Clay, Robinson Co., at Chicago, and I questioned him regarding that.

Thereupon defendant's exhibit A was offered and received in evidence, and is by this reference made a part of this Bill of Exceptions, and reads as follows:

[fol. 113] "—Glasgow 9-23 W. E. B. Wolf Point Please furnish 24-33-ft. cars to load cattle for So. St. Paul Oct. 2nd, Shippers Stephens and Cornwell. (Signed R. H. Cahan, Agent) (and in lower left hand corner, Stephens & Cornwell, by Stephens.)"

Witness, continuing: This message was prepared by me in the presence of Mr. Stephens. Mr. Stephens signed it "Stephens and Cornwell, by Stephens," in my presence. I did not at any time during the day promise Mr. Stephens or Mr. Cornwell that I would get cars for them. I did not have any authority to promise them any cars at any time. As to what was my duty in reference to placing of cars, we would take their order and furnish cars as soon as possible, and the orders were passed from my desk to Mr. Cahan's desk, the agent. Defendant's exhibit E is the original of the message set forth in defendant's exhibit A. As regards the alteration in the word "September" changed to "October," I did that; I was rereading the message before I transferred it to Mr. Cahan's desk, and I noticed I made it September instead of October, and I corrected it. That is in my own handwriting. By looking at the message I can tell what became of it,—it was delivered at the tele-

[fol. 114] graph office at 10:30 in the morning and forwarded to Wolf Point at 10:45, according to the operator's notation on it.

Thereupon defendant's exhibit E was offered and received in evidence, and is by this reference made a part of this Bill of Exceptions.

Witness, continuing: 10:30 represents the time this message was delivered to the telegraph office; W. O. means Wolf Point; 10.45 is the sending time; D is the operator that sent it; O. N. is the operator that accepted the message at Wolf point. The operator at Wolf Point received it at 10:45 A. M. Mr. Cornwell, plaintiff or any other party, did not at any time during my conversation with Mr. Stephens, or in the preparation of this exhibit E and A, make any statement that he wanted 11 cars for himself and 9 cars for Mr. Cornwell or any other party; he made no statement other than that they wanted the 24. That was the only statement made to me at any time during September and October by Mr. Cornwell or Stephens with reference to ordering cars. It was the only order I accepted myself and that was for twenty-four 33-ft. stock cars for Stephens and Cornwell. I did not ever learn until I came to Glasgow for this trial that this order was claimed to be split; that is, divided, 9 and 11. The first time I ever received any information in reference to this order being split into 9 and 11 cars, was Tuesday of this week; [fol. 115] that is the first time I ever heard anything of it. In placing the order there was never any mention made of it.

Defendant's exhibit B is a stock contract; I prepared that contract; it was prepared at the Great Northern freight office at Glasgow on October 16th. When I prepared it Mr. Stephens was present. It was signed by Mr. Cahan, the agent, and by Cornwell and Stephens by Mr. Stephens, and then I was a witness to it. I saw Mr. Stephens sign that contract and I was there at the time.

Thereupon said defendant's exhibit B was offered and received in evidence, and is by this reference made a part of this Bill of Exceptions.

Witness, continuing: I am at present Manager of the Equity Elevator at Hinsdale, and have been such since August, 1919. I ceased to be assistant cashier in February, 1919.

Cross-examination:

Prior to February, 1919, I had been in the employ of the Great Northern about two years and a half. I began with them in the Fall of 1916, first as an expense clerk at Glasgow. W. O. on the exhibit represents Wolf Point, and 10:45 A represents 10:45 in the forenoon; D was the operator's initial transmitting it, and O. N. was the operator who received it. There is nothing on that telegram [fol. 116] that indicates what date it was received at Wolf Point or transmitted to Wolf Point. It is possible that so far as the telegram shows it may have been transmitted the 24th of September, or the 1st of October, or any other date. I, of course, know nothing about

the telegram after it left my desk. I never saw it until it was handed to me in the court room or submitted to me by counsel. I do not know of my own knowledge whether the telegram went forward on the 24th or 26th or on any other date. As to whether I knew that Mr. Cornwell had no intention of shipping cattle to South St. Paul, I didn't talk to him. As to whether there were no cars ordered for South St. Paul, there were. Mr. Stephens ordered them for South St. Paul, yes, sir, 24 33-ft. cars for South St. Paul. He did not order them for September 2nd. I know Roy Jones; I was sitting alongside of him part of the time when this case was on trial when Mr. Cornwell was testifying, and Mr. Stephens also. On the other side of me was Mr. Cahan. I remember during the time Mr. Cornwell was testifying he had given an order for 9 cars to be loaded on October 2nd for Chicago, and was detailing the conservation with Mr. Cahan, that Mr. Jones inquired of me whether that was the conversation.

Q. At that time you turned to Mr. Cahan, did you not, and asked [fol. 117] him whether you were there when that conversation occurred.

A. I asked him where he was at when the conversation occurred.

Q. Then you turned to Mr. Jones and said you didn't think you were there, and Mr. Cahan said you were not there.

A. When I asked him, he said he didn't know where he had a conversation with Mr. Stephens, or whichever one was testifying at that time, and I did not hear them talking together at all, and that is what I told Jones.

Q. You also stated to Jones, when the conversation occurred between Cahan and Cornwell, that you were out of the office?

A. If it occurred in the office, I was out.

Q. You didn't say to Jones if it occurred, but, I was out of the office when it occurred?

A. Well, maybe that is it. I do not remember talking to some of the people coming down on the train the other day,—some of the witnesses in this case. I was not sitting or talking to any of them. As to whether I made any statement while on the way to Glasgow, or in Glasgow, that I didn't know anything about this case, I would have to ask you at what time you say it was made. As to whether within this week, and before I came on the stand this morning, I told persons in and about Glasgow that I didn't know anything about this case, and didn't know why I was subpœnaed; I was not subpœnaed [fol. 118] and, of course, I did not remember the case until I reviewed the records.

Q. In other words, until the telegram in your writing passed to the desk of Mr. Cahan, was submitted to you by counsel, you didn't have any recollection of this case or of any conversation.

A. I certainly did, yes, sir.

Q. How do you reconcile the statement which you admit you made to people here in town, that you didn't know anything about it, and the other statement, until you got the records, and now you do?

A. It is just this way; I didn't understand what case it was when

I was called up and told to come. I got down here and saw the records and what case it was and all our conversations.

Q. There was no other case of Mr. Cornwell's?

A. I didn't know he had a case until I came down here.

The order was placed in September, 1918, and this is March, 1921, and I had not thought of the matter all that time. There was not a thing in the world to impress it on my mind, not at all. Telegrams on company matters of business passed from my desk to Mr. Cahan's desk every day I was assistant cashier. As to whether aside from seeing the telegrams I would not remember it, I would remember this because they were one of the biggest shippers out [fol. 119] of here. As to what that would have to do with remembering the number of cars one of them ordered two years and six months ago, it would be because I don't take an order for cars unless I write it down. I said the method of recalling this was that these men were large shippers. I know I would not take any order other than by putting it down on paper. I never took any other order from Stephens and Cornwell and never had any conversation with them after that order was taken the time that they ordered the cars. As regards having any conversation with Mr. Cahan about the order, I just took the message and transferred it to his desk after it was completed. I do not remember ever having mentioned the matter from that time until I talked with Counsel.

Q. As a matter of fact, when a shipper orders any given length of cars, you people advise him, of course, they would have to take whatever was furnished?

A. You mean any size. I don't recall whether I advised them on that or not. As to telling you not by reference to my records, but from memory, just exactly what anybody who came up there that day, said to me respecting ordering cars, Mr. Stephens came to the window and requested me to place an order for cars for him. He said that he wanted to order cars for a shipment of cattle, and I [fol. 120] took his order as per the order there. As to whether that is the whole and all of the entire conversation, it is practically, though there may have been some few things additional. For instance, I think I recall he was talking about shipping to Chicago to Clay Robinson Company and at that time the question arose about ordering to South St. Paul. As to whether I am telling that because of something in this telegram, no, sir, I remember that; yes, sir, I remember he told me to get him cars for South St. Paul, and cars were actually ordered for South St. Paul. He didn't tell me whose cars they were to be. Yes, sir, as far as I knew they might be anybody's out there; I asked him absolutely no questions about the matter. As to whether the conversation didn't last over half a minute, it lasted just long enough to take his order. I could not say who was at the window before Mr. Stephens; I could not say who was there when Mr. Stephens and Mr. Cornwell came in. There were no other car orders placed on that day by me. I remember that by looking at the records. Yes, sir I went over the records. Those record- are kept filed in date order. Any time anybody wanted to go in there and quietly remove one of them, I don't suppose I

would have any way of telling he had done so. I had no car order system of book-keeping, no bound record so that I could tell when [fol. 121] an order had been removed from the record. Yes, sir, in my work as cashier over there, dealing with many matters of particular importance to the company, I had bound records. Everything is bound up in books so it can't be removed. As to whether in dealing with car orders I handle them so that anyone can slip them out, the- are fastened in with clips and you have to tear them out. The clips you have to push through and turn over. I could not say whether these exhibits were filed together, as I did not get them out of the file. They are in September, but dated on different dates and they would be filed in the 23rd and 24th orders. I looked them over; Mr. Cahan done the filing. These may have been torn from some clip. I can't say that they were among some records. There would be difficulty in substituting a record in there if it was in my handwriting. As to your not talking about my handwriting, but as to there being no difficulty in substituting among these records anything anybody wanted to substitute, or a piece of paper, I don't know. I know the filing system, and you could take a record out of there by lifting the clip or tearing and fixing the pieces, yes, sir.

J. J. TATTAN, being first duly sworn as a witness on the part of the defendant, testified as follows:

[fol. 122] Direct examination:

I acted as agent for the Director General of Railroads at Glasgow from July 14, 1920, until February of this year. I succeeded Mr. Cahan and had charge of the office and of the records of that office, and received the records of that office after Mr. Cahan left. I examined defendant's exhibit A before. I looked it up. As to when I looked it up and where I found it, I could not give you the exact date, but I made a reply to an inquiry for it and a letter transmitting it. I could not say exactly, but some time during the time that I had charge of the depot. As to where I found it, I found it among the stock car records for the year. As to what year, it was the year 1920. Yes, sir, it was the year 1920; I was the party that removed that from the file. I removed it from the stock file of 1920 filed by Mr. Cahan; I removed it from the file for stock car orders. We have different files,—correspondence files, message files and stock order files; we have different files and try to group them; if there is any call for them at the end of the year we try to collect those files and put them together. This was in what was called the stock order file and I was the party that removed it. As to whether this was in the stock files of 1920, or what was the year that file was used, [fol. 123] I don't recollect right from my own memory whether, well, I could not say right from my own memory positively the year. I looked it up and took it out of this record; I may be mistaken as to the 1920; it may have been in a different file; the 1920 is from

my own memory. Defendant's exhibit F is a letter transmitting this message to Mr. J. A. Nelson, the Claim Agent; I wrote that letter.

Thereupon defendant's exhibit F was offered and received in evidence, and is in words and figures as follows, to-wit:

EVIDENCE—DEFENDANT'S EXHIBIT 4

"Glasgow, Montana, Sept. 21, 1920. LS-940-5.

Mr. J. A. Nelson, F. C. A., St. Paul, Minn.

DEAR SIR: I herewith return your file above numbered. After searching all the records in the office I finally located what you want. I am attaching hereto the original order for the cars ordered. I also attach message received from Wolf Point relative to the shipment. You will note this shipment was from Cornwell and Stephens and the cars were ordered for them by Stevens.

I could not tell you what costs this party was put by having to hold his cattle out for the time he did. When these papers attached have served your purpose will you kindly return them to me.

Yours truly, J. J. Tattan, Agent.

[fol. 124] Q. I hand you defendant's proposed exhibit G and ask you if you can tell what that is?

A. Yes.

Q. What is it?

By counsel for plaintiff: To which we object on the ground it is not admissible in evidence until the foundation is laid for it. It is the best evidence of its contents.

Which objection was by the Court sustained; to which ruling of the Court the defendant, by his counsel, then and duly excepted, which said exception was thereupon duly noted and allowed, and is hereby preserved of record.

Q. Did you receive that letter at Glasgow?

A. Yes, sir.

Q. Who is it from?

By Counsel for Plaintiff: Alright, providing he knows of his own knowledge who sent the letter.

A. It is written by Mr. Nelson's office.

Q. Who is Mr. Nelson?

A. He is General Freight Claim Agent, St. Paul.

Q. After reading this letter so you can refresh your memory, can you say what file the order was taken, what year?

By Counsel for Plaintiff: I want to know whether you refer to Mr. Tattan's letter, which has been admitted in evidence, or some other letter which we have not seen.

[fol. 125] By Counsel for Defendant: This one.

Q. I will ask you, Mr. Tattan, if you at this time, if you are able to state what year that you took out this car order file from in the record?

By Counsel for Plaintiff: I object to that on the ground and for the reason the witness has answered that question.

By the Court: Yes, I think he has.

By Counsel for Defendant: I have asked him, by refreshing his memory he is able to do so.

By the Court: I didn't understand your question was that—you may reput the question.

By Counsel for Defendant:

Q. In reading this letter are you able to refresh your memory, Mr. Tattan, so as to state what year this order was taken from the files, the car order files?

By Counsel for Plaintiff: To that I object for this reason: the witness was not in the service of the Administration during 1918. This question, as I understand it, goes to refresh his recollection as to the year in which the order was given.

By Counsel for Defendant: No, as to the year for the car order files, from which it was taken.

By Counsel for Plaintiff: I object to the witness using somebody [fol. 126] else's letter, of which he knows nothing, and then being permitted to testify about a matter in which he was not connected with in any way.

By the Court: The objection is sustained.

To which ruling of the Court, the defendant, by his counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed and is hereby preserved of record.

Q. Can you tell Mr. Tattan from what year this stock order was taken from and removed from the files?

By Counsel for Plaintiff: To that I object as repetition.

Which objection was by the Court sustained, to which ruling of the Court the defendant, by his counsel; then and there duly excepted; which exception was thereupon duly noted and allowed, and is hereby preserved of record.

Witness, continuing: As to whether I am positive that it was the file for 1920 that that order was taken from, I took them out in 1920. I didn't mean the files were for the year 1920; I took them from the files in 1920. As to the year in which they were filed, this is new and I do not know about it. In the year 1920 I took this out and transmitted it. I could not tell you without correspondence as to when this order was placed; I could not say whether it was in the [fol. 127] 1919 file or in the 1918 file, but in 1920 I took it from the files. As to whether I said that I removed it from the 1920 file, I removed it from the files in 1920. I do not know what the year was of the files that I removed it from. I could not, without refer-

ence, of course; I could tell from this letter. After looking at this letter I can see from the files of what year it was taken.

Q. And what year is that?

By Counsel for Plaintiff: To that we object on the ground and for the reason the letter by which he is refreshing his recollection is not within his knowledge.

Which objection was by the Court sustained; to which ruling of the Court the defendant, by his counsel, then and there duly excepted, which said exception was thereupon duly noted and allowed, and is hereby preserved of record.

Witness, continuing: Those are the two letters received and written in reference to this exhibit constituting the car order. I received a letter just like this. I suppose it is the one; I had it pinned to mine; that is my letter there written to Mr. Nelson's office. As to whether the letter marked exhibit G is the letter I received or not, I could not say definitely, I received one similar to it; I could not swear it is the same letter. I could not recall exactly, no, sir, whether the letter I received had an erasure in there, not from memory.

[fol. 128] Cross-examination:

As to whether I stated to the Freight Claim Agent that I had searched all the records of the office, I meant that I had searched those that he had reference to in his letter. We had over there some kind of a filing system for the purpose of keeping track of our business, yes, sir, and I began an examination on the inquiry to determine certain things, yes, sir. I found the defendant's exhibit A for the defendant somewhere, yes, sir, and I transmitted it to the Freight Claim Agent at St. Paul, and it remained there with him after that, yes, sir, and I have never seen it since. As to whether it was in the office of the agent at Glasgow during the present week, it was not there unless it was returned after I left; I was out of there February 11th. At any rate I transmitted it on the 21st of September, 1920, or thereabouts, to St. Paul, and it was not put back in my papers while I remained as agent, in custody of those records. I did not transmit exhibit E; I do not think I transmitted exhibit C. I returned to Mr. Nelson all papers that were remitted to me for information to look up this record, and added to that file exhibit A and some telegram from Wolf Point. It was here on the attachments I made to the file. There is nothing to show what year exhibit A was written in and I don't know anything about it.

[fol. 129] As to whether I know where I got Exhibit A from, I took it from the file. I don't know what year it was removed from without seeing the files. I did not make any investigation to determine what cost the plaintiff was put to by having to hold his cattle out for the time he did. I didn't know who to go to for anything like that.

Redirect examination:

The order which I endeavored to get was an order in a suit according to my recollection of the letter, brought by Mr. Stephens.

Q. Calling your attention to the order which you sent in, and to this file, and turning back in here to the clip in this file, can you extract from that as carefully as you can—what is this file?

A. The 1918 stock car file.

Q. Will you extract from this as carefully as you can that piece of paper, and now will you fit that piece of paper into the telegram that was sent in (defendant's exhibit A),—does that now show the remaining part of the telegram constituting the car order?

A. Yes, sir.

Q. Without this piece of paper the "Glasgow" is not complete?

A. No, sir.

[fol. 130] Q. With this part magically inserted the "Glasgow" is complete?

A. Yes, sir.

Q. As regards the Jacobson order for September 24th, no year being shown, will you keep that same file and will you compare the remaining part of the telegram there shown?

A. Yes, sir.

Q. How does that jibe up with the Jacobson telegram for September 24th?

A. Just right.

Q. The one that corresponds to the Jacobson telegram is immediately after adjoining, in 1918, the one the Stephens telegram is taken from, is that correct?

A. Yes, sir.

Q. Let us extract this so the jury will understand. I am taking off beginning with the E and leaving the balance there; now take exhibit H and place it on top of Exhibit C,—what result do you get as to whether it fits?

A. It fits a certain part of it.

Q. The "brief" corresponds?

A. Yes.

Thereupon said defendant's exhibits H and I were offered and received in evidence, and are by this reference made a part of this Bill of Exceptions.

Witness, continuing: After having seen exhibits I and H extracted [fol. 131] from the file which I have, I say that the car order files for the year 1918 were the files from which the order was extracted. If I were asked to get a car order relating to a certain shipment, I would not get it out of the year of the car order file for the year that I received the request for it; I would get it from the file of the year that the car order was made.

GEORGE FISHER, being duly sworn as a witness on behalf of the defendant, testified as follows:

Direct examination:

I reside at Tampico and have been station agent there since August 29th, 1911, and was acting as such station agent there during the months of September and October, 1918; I am acquainted with the plaintiff and with Mr. Stephens. During the months of September and October, 1918, Mr. Stephens inquired about some stock cars; I could not give you a definite date when he made the inquiries. As regards whose cars he referred to in making these inquiries, he referred to the Stephens and Cornwell shipment. He made such inquiry at least twice and possibly three times. Mr. Cornwell may have been along but it was Mr. Stephens that made the inquiries. I did not at any time promise him that I would get him any cars.

H. R. CAHAN, being recalled for further cross examination, testified as follows:

[fol. 132] Plaintiff's exhibit 17 is the original of which defendant's exhibit C is a duplicate.

Thereupon said plaintiff's exhibit 17 was offered and received in evidence, and is by this reference made a part of this Bill of Exceptions.

Defendant's exhibit E was once in my possession; it is the one which come to my desk from Mr. Underwood's, being the telegram which went forward from the Glasgow telegraph office to Wolf Point; I filed it in the telegraph office for transmission to Wolf Point on September 23rd at 10:30 a. m. I am testifying as to my records. Exhibit 17, the Jacobson order, was also filed at 10:30 a. m. Of course, it would be impossible for me to remember every individual message I handled. If you want my personal recollection aside from the records, I would state that I have no recollection as to when exhibit 17 was filed for transmission. I have had occasion to handle a great many telegrams for the Great Northern; I am not a telegraph operator. I am somewhat familiar with what is done in the matter of transmitting telegrams, showing from what office it went out, and when, and the operator that handled it. I recognize on defendant's exhibit E that W. O. means Wolf Point, the hour of sending 10:45 a. m., D was the operator transmitting it, and the [fol. 133] letters O. N. are for the operator who received it. On plaintiff's exhibit 17, the Jacobson order, I find the same initials, W. O. and the hour 10:46 a. m., and the operator transmitting it, signing D, and the operator receiving it signing A. N. or A. R. The two and figure 1-30 signed there are in the same handwriting as regards the transmitting of the telegram. All that work, as I would view it, was put there by the telegraph operator using his left hand and using the key with his right hand and checking with his

left. As to whether or not those telegrams were transmitted one immediately after the other, I do not know whether they were or not. As to plaintiff's exhibit 18 coming into the office at Glasgow at about the date it is dated, I can't state positively that it did.

J. J. TATTAN being recalled for further cross-examination, testified as follows:

I know what exhibit 18 is. Defendant's exhibit F in that part of it which says,—"I also attach message received from Wolf Point relative to this shipment," refers to plaintiff's exhibit 18. G. W. was the telegraph call for Glasgow.

Thereupon said exhibit 18 was offered and received in evidence, and is in words and figures as follows:

EVIDENCE: PLAINTIFF'S EXHIBIT 18

"Great Northern Railway Telegram

Agent, G. W.: October 10.

[fol. 134] Your orders for thirty-one stock cars for Robinson, Jackson and Stevens will be filled next week, October 17th."

W. E. B.

Thereupon the witnesses J. P. SULLIVAN, L. E. GOSSELIN, and A. E. KNIGHTS testified on behalf of the defendant to facts which made it a question of fact for the jury as to whether or not the defendant had exercised reasonable care in furnishing the cars ordered at Glasgow and claimed to be due to the plaintiff, or to the witness Stephens, and making it a question of fact for the jury as to whether or not there was not a great, unusual and extraordinary demand for cattle cars all over the United States in September and October, 1918, and the number of cars to be available for use on the railway of the Great Northern Railway Company was not determined by the representatives of the Director General operating said railway, or by the Federal Manager of said railway, but by the Regional Director of the United States Railroad Administration at Chicago, acting for the Director General in matters relating to car distribution and general railroad matters over the railways of the Great Northern Railway Company, the Northern Pacific Railway Company, the Chicago, Milwaukee & St. Paul Railway Company, the Chicago & Northwestern Railway Company, and other railways in the Northwest, and that this said extraordinary [fol. 135] demand and the orders of said Regional Director regarding car distribution to the railway of said Great Northern Railway Company, made it impossible to furnish said cars at an earlier date than they were in fact furnished, the testimony of said witnesses not

being conclusive, but making said issues questions of fact for the jury; the witnesses testifying in part that the receipts of cattle at Chicago for September and October, 1918, were the largest of any on record for any previous month of any previous year, and that the receipt of all livestock at Chicago for the year 1918, as well as at the seven other western terminal stock markets, showed that during that year they were the largest receipts according to any previous year on record, and that the receipts of cattle at Chicago for September, 1918, were 67.9 per cent over the receipts for the same month for 1916, and 17.4 per cent over 1917, and for October, 1918, 38.5 per cent for the same month in 1916, and 14.4 per cent for the same month in 1917, and the receipts of cattle at Chicago for the week ending September 28 were the largest on record for receipts for any previous week of any previous year, the records going as far back as 1865, and the week ending Oct. 12, 1918, was the second largest; and that under Government operation cars previously owned by any railroad company were not, for purposes of [fol. 136] car distribution, treated as owned by said railway company or assigned to its lines, but same were treated by the Director General as available for the Railroad Administration, to be used on whatever railway over the United States he deemed it proper to distribute them, and that pursuant to this policy, Great Northern cattle cars loaded with cattle on points on the Great Northern railway, which the Great Northern Railway Company had theretofore directed be turned back at So. St. Paul were, during the period of Federal control directed to be run through to Chicago.

The witness, J. P. Sullivan, testified in addition as follows: The official railroad equipment register filed with the Interstate Commerce Commission shows the size of the cars furnished in the Stephens order, as set forth on the livestock contract, exhibit B. Thus, car AT&SF #58501 is a 40-ft. car, GH&SA 61112, 36-ft., GN 56043, 36-ft., GN 255255, and GN 256195, 33-ft., GN 55356, 44-ft., GN 255272, GN 256231, GN 255097, 33-ft., CB&Q 68374, 61454, 63482, 67354, 68219 and 66142, 36-ft., CM&StP 89447, 1279, 9947 and 831, 36-ft., and C&A 28976, 36-ft. Giving the exact lengths, the cars shown on the livestock contract were 714 ft. and 9½ inches; it shows one 40-ft. car, one 44-ft., thirteen 36-ft., and five 33-ft. cars. Twenty 33-ft. cars would be a total of 660 ft. To make a [fol. 137] total of 714 ft. in 33-ft. cars would require 21.

Thereupon the witness JAMES MITCHELL testified that he was a Veterinary Surgeon, a graduate of Cornell University and the New York State Veterinary College, and a resident state Veterinary Surgeon at Great Falls, and had been U. S. District Deputy Veterinary Surgeon for a year, and that in his opinion on the facts set forth in the evidence of the plaintiff, the plaintiff's animals would lose in weight, but it would represent a loss not of meat but only of bowel content, and that though they would lose in weight they

might even gain in flesh. But the testimony of said witness presented to the jury only a question of fact by said jury to be determined and did not present a question of law.

Thereupon the defendant rested.

REBUTTAL

C. J. O. JACOBSON, being called in rebuttal, testified as follows:

I reside in Glasgow, and have been a clerk for the Louis Weedum Company. In the year 1918 I shipped some cattle over the Great Northern Railroad. I am the father of Rush Jacobson. I know Mr. Cahan, the agent, and knew him in the months of September and October, 1918. Around about the 20th to the 23rd of September I gave direction to Rush Jacobson regarding ordering cars from [fol. 138] Mr. Cahan for the shipment of cattle. He told me that he had ordered a car. After that I asked Mr. Cahan if Rush had ordered the car, and he said he didn't exactly remember as Rush was along with Mr. Cornwell and Stephens when they ordered their cars, and I wanted our car to go with them. Mr. Cahan was then coming across from the depot. This was a few days after I requested my son, Rush, to order a car. Yes, sir, it was on the same day,—it was a few days afterwards; I don't remember exactly how many days. The words "C. J. O. Jacobson" on defendant's exhibit C are in my handwriting. I can't remember exactly the date that I wrote my name there, but I saw Mr. Cahan afterwards and asked him what time the car would come, and he gave me the date and I sent word to Rush to bring the cattle in, and he brought them in, and afterwards Mr. Cahan told me the cattle were in here. I think I brought the cattle in about the first of October. It was just the evening before I was going to get the car. As to whether it was a few days after I had the conversation with Mr. Cahan on the street that I wrote C. J. O. Jacobson on exhibit C, I could not state. I know a few days afterwards I went to the freight office and Mr. Cahan told me the day the car would come, and I signed my name there. I suppose I signed it because he asked me to do so.

[fol. 139] Cross-examination:

I gave my son directions to order a car and saw him the same day that he had put in an order; I did not see Mr. Cahan; my conversations that day were solely with my son; he told me that he had ordered a car and that Stephens and Cornwell had ordered their cars, and that he ordered a car at the same time that Stephens and Cornwell ordered their cars.

JAMES R. STEPHENS testified for the plaintiff in rebuttal as follows:

I have already testified. I recall the incident relating to the movement of these cattle from the stock yards on the 16th of October, 1918. After they had been loaded the train was backed up into the yard near to where the depot is; we were told to just get on the train, that we were going to back up into the yard so that we could sign the billing as soon as it was possible to sign it. I had nothing to do with giving the agent, or anybody, the car numbers. Mr. Cornwell was taking down the car numbers and so was Mr. Cahan. I did not deliver any car numbers or make any suggestion as to how they were to be consigned, to Mr. Underwood, or any of the employees of the railroad administration, no, sir. No, sir, I know nothing about how the billing clerk got the information. When our train was backed up to the depot I got no instructions whatever [fol. 140] from any person regarding any contract. After the train got in we went at once into the depot and signed the contract, as we had been instructed by Mr. Cahan. We had absolutely no control about how the contract was made up; it was made up when we arrived. Yes, sir, we were told that the train was to move out immediately. The train was supposed to leave immediately. No, sir, nobody told me how long a time we would have to look over anything presented for signing. When I got into the office I do not recall anything about exhibit B which I have in my hands. I did not notice how the stock was billed out.

(The witness then continued testifying contrary to Dr. Mitchell's testimony for the defendant, that the animals would actually lose in flesh and not merely in bowel content.)

Cross-examination:

I think we arrived at the stock yards some time between 8 and 9 o'clock in the forenoon. I looked after taking the cattle from the pens and putting them in the loading pens; the entire herd that Mr. Cornwell and myself had. Mr. Cornwell counted them as they went into the cars, taking the number of the cars as they went in. This refers to the entire herd of the cattle of both of us. I think the train left Glasgow about 6 o'clock in the afternoon. I don't [fol. 141] recognize that contract, Exhibit B, as the contract that was signed up by me governing the shipment of this entire herd. I don't know whether this train left or was leaving just about the time I signed that contract.

Thereupon the witness ROY BLACK, and R. L. CORNWELL, testifying for himself, testified contrary to the testimony of Dr. Mitchell, that under the evidence in the plaintiff's case the animals would shrink in actual flesh and not merely in bowel content.

And the said Cornwell further testified that he did not, to his recollection, furnish any information to any billing clerk, cashier, or assistant cashier, or anybody else in the office of the Great North-

ern Railroad relating to the shipment of the cattle made by him on October 16, 1918, and that he has no personal knowledge as to how such information was obtained by the person who is the billing clerk, and that to his recollection he had nothing to do with the giving of such information to anybody, and that he knows nothing about the livestock contract, known herein as Defendant's Exhibit "B," and has no information as to whether it was the contract on which the cattle were transported.

Thereupon the reply was amended so that where the same referred to the complaint filed in the action, it should read the "amended complaint" filed in the action.

And thereupon the plaintiff asked and obtained leave to amend the complaint by striking out the word "eleven" in reference to the number of cars ordered and by inserting in lieu thereof the word "nine."

Thereupon the plaintiff rested.

The foregoing is so much of the substance of the testimony introduced in the trial of the above entitled cause as is necessary to explain the objections and exceptions later set forth in the Bill of Exceptions.

[fol. 142] In District Court of Valley County

Defendant's Motion for and Order Overruling Directed Verdict

Thereupon the defendant moved for a directed verdict as follows:

Comes now the defendant in the above entitled cause and moves the Court for a directed verdict in favor of the defendant, upon the following grounds:—

1. The evidence fails to show any binding express contract between the plaintiff and the defendant, or any violation of any legal duties owed by the defendant to the plaintiff.

2. The evidence shows that the order in question for the cars was a joint order by Stephens and Cornwell for twenty-four 33-ft. stock cars for their joint use, and no tender was made of any cattle by Cornwell separately, or so far separate and apart from any tender by Stephens; that the defendant was given to understand that it might furnish cars to Cornwell, or ship Cornwell's cattle without furnishing cars to Stephens, or shipping Stephens' cattle.

3. Insofar as the plaintiff's testimony may be construed as an attempt to repudiate the order offered by the defendant, which is the only order shown in the evidence to be in writing, the plaintiff's case must depend wholly upon a written order, for an order for cars other than an order in writing would not be valid.

By the Court: You do not care to argue the motion for a directed verdict?

By Counsel for the Defendant: No, sir. Not at this time.

Thereupon it was ordered that the record show that counsel who presented the motion announced that he did not desire to argue it.

Which said motion was by the Court overruled; to which ruling of the Court the defendant, by his counsel, then and there duly excepted, which said exception was thereupon duly noted and allowed, and is hereby preserved of record.

[fol. 143] The foregoing sets forth so much of the substance of the evidence and testimony introduced on the trial of the above entitled cause and the evidence and testimony offered and rejected as is necessary to explain the objections made and exceptions taken set forth in this bill of exceptions and all the proceedings on the trial of said cause up to the time when the taking of the evidence and testimony in said cause was completed and defendant's motion for judgment denied.

And thereupon, when the evidence as above set forth was concluded, the parties reduced to writing such special instructions as they desired to have given to the jury, and numbered them, and said requested instructions reduced to writing and numbered as aforesaid, together with a written request for the same, and signed by the attorneys for the respective parties, respectively requesting them, were duly delivered to the Court, and thereupon, prior to charging the jury, the instructions to be given were, without the presence of the jury, settled by the Court, and the following sets forth all the proceedings had in such settlement, and sets forth all instructions requested by the respective parties, and the objections made to all instructions tendered by the respective parties, or proposed to be given by the Court, and the exceptions taken to the overruling of said objections, and the rulings of the Court and the refusal to give said requested instructions; and the Court then marked upon each instruction as aforesaid requested by the respective parties, whether it was given in whole or in part, or refused or modified, and herein is set forth wherein the modification consisted, [fol. 144] together with all objections made and exceptions taken upon the settlement of the instructions, which said objections and exceptions and the ruling of the Court thereon were taken down by the Court Stenographer present at such settlement, and written out at length and filed with the Clerk, and are hereby preserved and incorporated in and settled in this Bill of Exceptions; that is to say, in the absence of the jury, and present the Judge who tried said cause, the attorneys for the respective parties, and the Court Stenographer, the following proceedings were had and done with reference to the settlement of instructions, to-wit:

Defendant's Requested Charges

The Court refused to give defendant's requested instruction No. 1, as follows:

No. 1. You are instructed to return a verdict for the defendant.

To which ruling of the Court the defendant, by his counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed, and is hereby preserved of record.

The Court refused to give defendant's requested instruction No. 2, as follows:

No. 2. You are instructed that under the pleadings and evidence in this case, the plaintiff cannot recover unless you find from the evidence that the said plaintiff ordered, requested or directed de- [fol 145] defendant, Director General of Railroads to furnish cars for the use of or disposition by said plaintiff, for the transportation of the cattle described in the plaintiff's complaint and that said plaintiff tendered the said cattle to the defendant for transportation, and that such order, request, direction, or tender, if any, was so far independent of any order, direction, request, or tender, if any, of Stephens, that the defendant, Director General, was fairly and intelligently given to understand that he, the said Director General, had the right or option to furnish said cars to plaintiff, for the shipment of his said cattle and to demand of said plaintiff, that he, the plaintiff, take and use said cars for the transportation of said cattle and to transport the same even though no cars should be furnished for the use of or disposition by Stephens and even though no other cattle should be transported for Stephens.

To which ruling of the Court the defendant, by his counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed, and is hereby preserved of record.

The Court refused to give defendant's requested instruction No. 3, as follows:

No. 3. You are instructed that you cannot award the plaintiff any damages for depreciation in the market value of the cattle referred to in the complaint unless you find from the evidence that [fol. 146] there was a difference between the market value of said cattle at Glasgow, Mont., in the condition that they would have arrived there on Oct. 2, and the condition in which they did arrive there later in October when they arrived for loading.

To which ruling of the Court the defendant, by his counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed, and is hereby preserved of record.

The Court gave defendant's requested instruction No. 4, and the same appears as the Court's instruction No. 9.

The Court refused to give defendant's requested instruction No. 5, as follows:

No. 5. You are instructed that the burden of proof is upon the plaintiff to establish the allegations of the complaint by a preponderance of the evidence, and unless you find that the allegations of the complaint are proven by a preponderance of the evidence, then you must find for the defendant.

To which ruling of the Court the defendant, by his counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed, and is hereby preserved of record.

The Court gave defendant's requested instructions No. 6 and 7, and the same appear as the Court's instructions No. 10 and No. 11.

The Court refused to give defendant's requested instruction No. 8, as follows:

[fol. 147] No. 8. This is an action brought by the plaintiff, to recover damages alleged to have been sustained by the plaintiff by reason of an alleged failure on the part of the defendant, Director General of Railroads, to comply with a direction or order alleged to have been given by the plaintiff, on or about September 23rd, 1918, for nine suitable stock cars to be furnished at Glasgow for the use of the plaintiff on October 2nd, 1918, sufficient to transport the cattle described in the complaint. It is the existence, if any, of this alleged order, if any, made on or about September 23rd, which constitutes the basis of the action and without which no recovery can be had by the plaintiff. The allegations of the complaint as to a tender, if any, of the cattle for transportation, after the plaintiff is alleged to have driven said cattle into Glasgow, after such order, request or direction refer to a tender of said cattle pursuant to said order.

You are instructed that said alleged order, request or direction of September 23rd is the basis of this action without the existence of which there can be no recovery by the plaintiff.

To which ruling of the Court the defendant, by his counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed and is hereby preserved of record.

The plaintiff objected to said requested instruction No. 8 on the following grounds:

[fol. 148] That the instruction is misleading for the reason that in the event the jury should not find that there was a contract it would limit them to the consideration of that certain exhibit offered by the defendant; signed by W. R. Cahan, addressed to W. E. B. at Wolff Point, ordering 24—33 stock cars, and the jury would then be told that in the event that they did find the existence of such order, then they must return a verdict in favor of the defendant; whereas, the fact is, that the so-called order referred to in said exhibit was not an order to which the plaintiff's name was in any way attached, or concerning which, the evidence shows, he had any knowledge, or that the signing by any persons was authorized in any way by him, and should the jury reach the conclusion that the instruction refers to such written instrument, then it would be misled by the instruction.

The Court refused to give defendant's requested instruction No. 9, as follows:

No. 9. If you find from the evidence that the order to the defendant for cars was not an order placed by the plaintiff or his

own use for nine (9) stock cars to be at Glasgow Oct. 2nd, but was an order for 24 thirty-three (33) foot stock cars purporting to be placed by Stephens and Cornwell jointly for the joint use and disposition by them both, then the plaintiff cannot record.

[fol. 149] To which ruling of the Court the defendant, by his counsel, then and there duly excepted, which said exception was thereupon duly noted and allowed, and is hereby preserved of record.

The plaintiff objected to said requested instruction No. 9 on the following grounds:

First. That the instruction, as formulated, is not a correct statement of the law in this; that, before the jury would be justified in finding for the defendant on the theory of a joint contract, it would be necessary that it be shown that all of the joint obligees under the contract were interested in the subject matter thereof, and that the instruction as now formulated would deny the right of suit to a joint obligee to the contract, who had a separate interest therein, and in which interest no other obligee had any interest whatsoever. The evidence in this case shows that Cornwell was the sole owner of the cattle involved in this action and that the cattle were of a different kind and character to that of Stephens or any other persons that shipped; that the cattle of Cornwell were loaded in separate cars and were transported as a separate shipment, connected with other shipments only by connecting the cars together for the convenience of the United States Railroad Administration.

Second. It is objected to on the ground and for the reason that [fol. 150] under the statutes in this State all joint obligations are joint and several, and that the evidence in this case now shows absolutely no interest in this order, or in the shipment of the cattle, or in the cattle, or in the damages sought to be received, by any person other than Cornwell, and under the rule in 48 Montana, 495, American Loan & Livestock Company v. Great Northern, Cornwell could maintain this action upon the theory that it is joint contract, as contended for by the defendant.

Third. That the instruction is misleading in that it specifies the order to the defendant for cars; whereas there is evidence in this case tending to show at least three different and distinct orders;—first, the order by Cornwell for nine cars; second;—order by Stephens for eleven cars, third;—the order given by Stephens for his neighbors for three or four cars, and fourth;—it is contended by the defendant that there was the order purporting to have been given by Stephens and Cornwell for twenty-four cars, but it has not been shown by any evidence that Cornwell ever had any interest therein or authorized the signing of such order, or ever ratified the same, or was bound thereby.

Fourth. That this instruction would advise the jury that even though it believed that Cornwell placed an order for nine cars on the 23rd of September, 1918, and that thereafter Stephens put his name [fol. 151] on the exhibit, the telegram to the chief dispatcher, ordering twenty-four stock cars, then Cornwell could not recover, whereas;

it has not been shown that Cornwell had any knowledge of the order, or was in anywise interested in it, or was bound by it.

The Court refused to give defendant's requested instruction No. 10, as follows:

No. 10. You are instructed that if you find from the evidence that the only order, direction, contract or request, if any, for cars was a joint order, direction, contract or request purporting to be made by plaintiff and Stephens jointly, and on behalf of both for the joint use of and disposition by the plaintiff and said Stephens jointly and not otherwise and that no order, direction, contract or request, purporting to be made, if any, for cars, and no tender, if any, of cattle was made by the plaintiff in such a way as to fairly afford to the defendant the right and privilege to furnish cars to the plaintiff alone and to demand of said plaintiff, Cornwell that he the said Cornwell take and use said cars for the transportation of the cattle mentioned in the complaint, even though no cars should be furnished for the use of or for the disposition by Stephens and even though no other cattle should be transported for Stephens, then the plaintiff cannot recover and your verdict must be for the defendant.

[fol. 152] To which ruling of the Court the defendant, by his counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed, and is hereby preserved of record.

Defendant's requested instruction No. 11 was withdrawn, and no instruction No. 11 was requested.

The Court gave defendant's requested instruction No. 12, and the same appears as the Court's instruction No. 12.

The Court refused to give defendant's requested instruction No. 13, as follows:

No. 13. You are instructed that if you find from the evidence that on September 23rd the plaintiff and Stephens jointly ordered, requested or directed the defendant to furnish cars at Glasgow for October 2nd, for the joint use of and for joint disposition by the plaintiff and Stephens and not otherwise, and that on October 2nd, or succeeding days or at any time the plaintiff and Stephens jointly tendered all of the cattle, if any, held by them in the vicinity of Glasgow as an entire shipment and not otherwise then the plaintiff cannot recover.

To which ruling of the Court the defendant, by his counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed, and is hereby preserved of record.

The Court refused to give defendant's requested instruction No. 14, as follows:

[fol. 153] No. 14. You cannot find that there was an express contract to furnish cars unless you find from the evidence that the defendant not only agreed to furnish the cars but that, plaintiff also expressly or impliedly agreed to load the cars.

To which ruling of the Court the defendant, by his counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed, and is hereby preserved of record.

The Court refused to give defendant's requested instruction No. 15, as follows:

No. 15. Even if the agent agreed to furnish the cars this mere agreement, if any, would not be binding upon defendant unless you find from the evidence that the plaintiff also expressly or impliedly agreed to load with cattle all the cars ordered. In other words an agreement is not binding if made only by one side; before an agreement to furnish cars can be held to be a contract it must be supported by a consideration, that is to say by the promise of the other party to load the cars with cattle.

To which ruling of the court the defendant, by his counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed, and is hereby preserved of record.

The Court refused to give defendant's requested instruction No. 16, as follows:

No. 16. The complaint does not allege that defendant was under [fol. 154] any obligation to give plaintiff advice as to whether or when the cars would be on hand, but only with having failed to furnish the cars. You are not, therefore, authorized to find that defendant was under any duty to give such advice or that defendant was negligent in any such respect. As regards the furnishing of cars you are limited to the question whether there was an express contract or in the absence thereof, on what date should defendant reasonably have furnished the cars.

To which ruling of the Court, the defendant, by his counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed, and is hereby preserved of record.

The Court gave defendant's requested instruction No. 17 and the same appears as the Court's instruction No. 13.

The Court refused to give defendant's requested instruction No. 18, as follows:

No. 18. If you find that there was no special express contract to furnish cars and that damage, if any, to plaintiff's cattle would have been avoided by plaintiff awaiting advice from the defendant as to whether the cars would be on hand and the date they would be on hand, then the plaintiff cannot recover for such damages.

To which ruling of the Court the defendant, by his counsel, then [fol. 155] and there duly excepted; which said exception was thereupon duly noted and allowed, and is hereby preserved of record.

Defendant's requested instruction No. 19 was withdrawn, and no instruction No. 19 was requested.

The Court refused to give defendant's requested instruction No. 20, as follows:

No. 20. A Station Agent of the Director General has no authority to enter into an express contract to furnish cars on a date named by a shipper irrespective of the general service due the public and his express agreement, if any, to furnish the cars on that date is not binding if that date is not a reasonable time.

To which ruling of the Court the defendant by his counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed, and is hereby preserved of record.

The Court gave defendant's requested instructions numbered 21, 22 and 23, and the same appear respectively as the Court's instructions numbered 14, 15 and 16.

The Court refused to give defendant's requested instruction No. 24, as follows:

No. 24. You cannot review any car distribution made by the Director General himself or by his representatives determining general questions of distribution over the United States. In the matter of car distribution you can find the Director General negligent only if you [fol. 156] find that his representatives operating the railway prior to Federal operation known as the Great Northern Railway were negligent in their distribution of cars which he allotted to them or allowed them to use.

PLAINTIFF'S REQUESTED CHARGES

The Court gave the plaintiff's requested instruction No. 1, which appears herein as the Court's instruction No. 1.

The Court: The Court proposes to give the plaintiff's requested instruction No. 2 (which appears herein as the Court's instruction No. 2).

By Counsel for Defendant: We object to the plaintiff's requested instruction No. 2, on the ground, that it fixes as the measure of damages the market value at Chicago; whereas, the measure of damages would be the difference, if any, in the market value of the cattle at Glasgow, in the condition and at the time the cars should have been furnished, and in the condition that they, in fact, did arrive when the cars were furnished, insofar as such depreciation in condition, if any, was due to acts of the defendant.

Second: The defendant objects to said instruction in that it makes the defendant liable for all shrinkage of said cattle during the time they were held, irrespective of whether or not the defendant was liable therefor, and in this respect is inconsistent with instruc- [fol. 157] tions requested by the defendant and marked by the Court that they would be given, in that the defendant's requested instructions were that the defendant was not responsible for the shrinkage caused by the plaintiff's acts, or not caused solely by the defendant's acts.

Which said objection was by the Court overruled; to which ruling of the Court the defendant, by his counsel, then and there duly ex-

cepted; which said exception was thereupon duly noted and allowed, and is hereby preserved of record.

The Court: The Court proposes to give the plaintiff's requested instruction No. 3 (which appears herein as the Court's instruction No. 3).

By Counsel for Defendant: The defendant objects to the plaintiff's instruction No. 3 on the ground that it makes the defendant liable for the agent's promise or agreement to furnish cars, even though there was no consideration for such promise, and even though the plaintiff did not expressly or impliedly contract to load the cars, in that the instruction states to the jury:—that he plaintiff is entitled to recover if he proved the order by him and that the agent promised to furnish the cars, even though the time fixed was not a reasonable time.

Defendant further objects on the ground that it makes the de- [fol. 158] fendant liable for the alleged promise of the agent, even though the defendant could not in the discharge of its duties ever have furnished the cars, and makes the defendant liable for the promise of the agent, even though the promise of the agent would constitute a discrimination by the agent.

Which said objection was by the Court overruled; to which ruling of the Court the defendant, by his counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed, and is hereby preserved of record.

The Court: The Court proposes to give the plaintiff's requested instruction No. 4 (which appears herein as the Court's instruction No. 4).

By Counsel for Defendant: Defendant objects to plaintiff's proposed instruction No. 4 on the ground that it makes the defendant liable upon a mere promise or agreement of the agent, even if there was no consideration for such promise, in other words; if the agent promised to have cars and the plaintiff did not expressly, or impliedly, promise to load the cars, the defendant would be liable, whereas; the defendant cannot be liable for the promise of the agent unless there is consideration therefor, and the defendant further ob- [fol. 159] jects to the instruction on the grounds stated to instruction No. 3.

Which said objection was by the Court overruled; to which ruling of the Court the defendant, by his counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed, and is hereby preserved of record.

The Court: The Court proposes to give thee plaintiff's requested instruction No. 7 (which appears herein as the Court's instruction No. 7).

By Counsel for Defendant: To plaintiff's requested instruction No. 7, the defendant objects on the ground that it constitutes an express comment on the evidence. One issue in this case, is whether the plaintiff placed an order for nine stock cars. This alleged order by the plaintiff and testified to by him is the basis of this action. To disprove that any such order was placed the defendant produced

witnesses that deny that in fact any such order had been placed, and in addition these witnesses produced the order which, they say, was the only order made on September 23rd concerning or connected with the shipment of the cattle in question, such order being exhibit A. The existence of exhibit A under the testimony is affirmative proof, disproving the plaintiff's allegation that he made the [fol. 160] order as he alleges. The Court by this instruction directly charges the jury that this exhibit is not sufficient evidence that the several order claimed to have been placed by the plaintiff was not made. The issue between the parties is, was the order placed severally, or was the order, which was communicated to the defendant, a joint order. As a meeting of the minds is necessary in order to establish a contract, or in order to have an obligation, if the jury should find that the only order that was communicated to the defendant was an order bearing the names of Stephens and Cornwell, by Stephens, and purporting to come from them, then the only meeting of the minds would be regarding such an order, and the existence of exhibit A, so purporting to come from Stephens and Cornwell, would be sufficient evidence that the only order communicated to the defendant was a joint order.

Defendant further objects to said instruction on the ground that the same is inconsistent with defendant's requested instruction No. 12, the Court advising the jury that if the only order for cars was one purporting to have been made by Stephens and Cornwell, then the plaintiff cannot recover, while in this instruction the Court says, that when defendant's witnesses produced exhibit A, purporting to be an order bearing the name of Stephens and Cornwell, this order so [fol. 161] purporting to be made by Stephens and Cornwell, would not be sufficient evidence to justify the return of a verdict for the defendant. In other words, in instruction No. 12 proposed by the plaintiff and marked, given, the Court says, that if the order purporting to be made by the plaintiff and Stephens jointly, is the order that the jury finds was the only one communicated to the defendant, then the plaintiff cannot recover, but in instruction No. 7 the Court advises the jury that if exhibit A, which purports to be an order made by Stephens and Cornwell, is believed by them to be the order that was filed, this would not be sufficient evidence to justify them in finding that order made was a joint order, and therefore, not an order by Cornwell for nine cars.

The Court: The objection is overruled, and an exception is allowed. In order to show that exhibit A was the order filed, you would have to show that Cornwell authorized it, and in addition I think the shippers could by private arrangements between themselves, uncommunicated to the defendant, make an order joint on its face several as to them if by the arrangement between themselves their interests were several.

The Court: The Court proposes to give the plaintiff's requested instruction No. 8 (which appears herein as the Court's instruction No. 8).

[fol. 162] By Counsel for Defendant: The defendant objects to the Court's instruction No. 8, on the ground that the joint order

shown in the evidence, that is to say, exhibit A, and the only order that the defendant's witnesses testified was filed, was joint in its terms, and the legal interest of Stephens and Cornwell therein was joint, in that there was no apportionment therein between Cornwell and Stephens of the cars each one could use as compared to the other, and therefore there is no evidence justifying a submission of this instruction.

Defendant further objects to the instruction on the ground that the same is not the law, in that it says that if a joint obligation appears to be joint by its terms it may, nevertheless, be treated as several, though there is nothing in its terms that justifies an interpretation that the interest is several, thus in the instruction in question the Court says that if such obligation may appear to be joint by its terms the plaintiff may, nevertheless, maintain an action if in fact (that is to say, by facts not shown in the instrument itself and not shown in the order as testified to by the defendant's witnesses as the only one which was made) the legal interest in the order or obligation is several. By this instruction though the jury should find that the only order placed was the order testified to by the [fol. 163] defendant's witnesses, (that is to say an order for 24 33-ft. stock cars, placed by Stephens and Cornwell, without apportioning the cars between them), the Court by this instruction authorizes the jury to disregard the terms of the order as so communicated to the defendant and to hold that it was a several order if unknown to the defendant, the plaintiff was the only person interested in part of the cattle in the entire herd, that is to say, in his cattle. Thus under this instruction where the defendant's witnesses have testified that the only order that was placed was an order for 24-33 foot stock cars and that this was the only order which was communicated to the defendant's agent, and therefore the only order on which the minds of the parties would have met, which would be the joint order, by this instruction the Court instructs the jury that if Stephens and Cornwell without communicating to the defendant at the time the order was placed, determined then or later that a certain number of said cars should be used to load the plaintiff's cattle, and certain number should be used to load Stephens' cattle then said order would become a several order, or joint order in which the legal interest was several. Thus without the same being communicated to the defendant an order known to the defendant by its terms to be only joint, has its terms modified by private arrangement between the parties. In the order testified to [fol. 164] by the defendant's witnesses as the only one which was communicated to the defendant, if Stephens and Cornwell had a dispute before the cars arrived as to how many each should have for loading his cattle, the defendant agent under such order could not be charged with the burden of apportioning the cars. If the order communicated to the agent was an order by Stephens and Cornwell for 24 cars and Stephens thereafter determined that he wanted to use twelve cars to load and Cornwell twelve, and Cornwell said to the agent that he wanted to use fourteen and that Stephens should be allowed only ten the agent could not be bound by these

statements and could not be made to change the terms of the order and apportion the cars between them, but by the instruction in question they could impose this burden upon defendant of determining a quarrel between them as to the cars, or as to apportioning their rights to the cars, even by transactions between them never communicated to the agent even after the train had left.

Furthermore by the instruction in question, though the only order communicated to the defendant is the joint order, wherein, as far as any communication to the defendant is concerned and by the terms of the obligation, defendant has contracted or dealt with Cornwell and Stephens jointly, so that the defendant could be made [fol. 165] to respond in only one suit, the jury is by this instruction advised that by acts occurring solely between Cornwell and Stephens, themselves, and uncommunicated to the defendant the obligation, joint in its terms, may be made several and the legal interest which was joint in fact, may be made several by an arrangement between themselves uncommunicated to the defendant. Thus, though the defendant would have been obligated only to both of them, each could acquire the right to sue the defendant separately, though the defendant's mind had never concurred in such a change in the obligation and under the instruction in question if the obligation communicated to the defendant was that twenty-four cars should be furnished to Cornwell and Stephens jointly, and no other order was communicated to the defendant, and though the defendant might have been able to fill the order, if the apportionment of the cars between Stephens and Cornwell by themselves had been communicated to the defendant the obligation is made several by these communications between them uncommunicated to the agent without the right in the defendant to tender cars according to the apportionment; the instruction is inconsistent with the Court's instruction No. 12, in that instruction No. 12 correctly defines a joint, as distinguished from, a several, order, and instruction 8 in attempt- [fol. 166] ing to define a joint order, makes a joint order a several order by negotiations between Stephens and Cornwell, uncommunicated to the defendant, which instruction is inconsistent, with the decision in the case of American Loan & Livestock Company, in 48 Montana.

Which said objection was by the Court overruled; to which ruling of the Court the defendant, by his counsel, then and there duly excepted, which said exception was thereupon duly noted and allowed, and is hereby preserved of record. The Court refused to give the defendant's requested instruction No. 1-A, which is as follows:

No. 1-A. An obligation is joint where the legal interest is joint, that is to say, not the interest which may be had in the performance of the obligation, but the technical legal interest created by the obligation itself and communicated to the defendant. Under an obligation joint in terms the obligees cannot severally maintain an action on it by reason of any apportionment of their interests therein between themselves, not communicated to the obligor when the obligation is created.

To which ruling of the Court the defendant, by his counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed, and is hereby preserved of record.

[fol. 167] To said instruction the plaintiff objected on the following grounds:

First. That it is not a correct statement of the law in this respect, in that under the law the interest of the parties in the obligation to the extent to which they may be interested, in which obligation several are joined by a joint obligation, may be several and the several interests do not have to be communicated to the defendant.

Second. The instruction advises the jury that, in cases expressly recognized by the decision in the American Loan & Livestock Company v. Great Northern Railway Company, wherein persons severally maintain actions upon joint obligations, nevertheless obligees may not under those circumstances, severally maintain an action.

The Court refused to give the defendant's requested instruction No. 1-B, as follows:

No. 1-B. An obligation joint in its terms cannot be considered as creating a several obligation therein in each party thereto by reason of an apportionment of their interests therein by any arrangement between themselves uncommunicated to the defendant.

To which ruling of the Court the defendant, by his counsel then and there duly excepted; which said exception was thereupon duly noted and allowed, and is hereby preserved of record.

The plaintiff objected to said proposed instruction on the same [fol. 168] ground as the plaintiff objected to requested instruction No. 1-A.

INSTRUCTIONS OF THE COURT

Thereupon, after the foregoing objections had been duly made and ruled upon by the Court, and after the instructions to be given to the jury had been settled as aforesaid, the Court instructed the jury as follows:

No. 1. The plaintiff herein seeks to recover of and from the defendant the sum of Twenty-nine Hundred ninety-five dollars ($2,995.00), with interest thereon at the rate of eight per cent per annum from and after the date of the commencement of this action.

In his amended complaint the plaintiff alleges that the defendant is the legally qualified person against whom actions which arose out of the operation of the Great Northern Railway Lines by the United States Railroad Administration, might be instituted and maintained, and the defendant admits this fact which you will therefore take to be true, and if you find for the plaintiff you will return a verdict in his favor against the defendant.

The plaintiff alleges that he at the time mentioned in his amended complaint was the owner, entitled to the possession of, and in the possession of two hundred thirteen (213) head of stock cattle, consist-

ing of sixty-five (65) head of four year old steers, seventy-five (75) head of three year old steers, fifty (50) head of two year old steers [fol. 169] and twenty-three (23) dry cows, all of which prior to the second day of October, 1918, were grazing upon the range in Valley County, Montana, about thirty-five miles North of the City of Glasgow, and that on or about the twenty-third day of September, 1918, plaintiff intending to ship all of the said cattle over the line of railway operated by the United States Railroad Administration from Glasgow, Montana to Union Stock Yards, Chicago, Illinois, ordered the United States Railroad Administration to furnish him on, and not later than October 2nd, 1918, nine stock cars, such as were customarily used by the United States Railroad Administration in the transportation of cattle, and that plaintiff also ordered motive power to be available for loading said cattle at Glasgow, Montana and transporting the same in the early morning of October 2nd, 1918, and that said orders were given to the agent of the United States Railroad Administration in charge of the transaction of its business at said Glasgow, and that said agent of said United States Railroad Administration promised and agreed that said cars and motive power would be furnished as directed in the early morning of October 2nd, 1918, and plaintiff further alleges that the time elapsing between the twenty-third day of September, 1918 and the second day of October, [fol. 170] 1918, was a reasonable time for the United States Railroad Administration to furnish such motive power and cars, and that the United States Railroad Administration knew that plaintiff was relying on its furnishing said cars and motive power on the second day of October, 1918.

And plaintiff further alleges that at the time he ordered the cars and motive power the stock cattle, above mentioned, were grazing on the range, as above set forth, and that, relying upon the agreement that the cars and motive power would be furnished on the second day of October, 1918, caused the cattle to be rounded up and driven to a point about five or six miles northwest of Glasgow, Montana, and about thirty miles from their range, and that said cattle arrived at within five or six miles of Glasgow on the evening of October 1st, 1918, so that they could be delivered on October 2nd, 1918, at Glasgow to be loaded, and that he was ready, able and willing to and could readily have delivered said cattle to the United States Railroad Administration on the second day of October, 1918 for transportation and that said cattle were then in prime beef condition. He further alleges that in the evening of the first day of October, 1918, the United States Railroad Administration notified him while his cattle were within five or six miles of Glasgow that the cars and mo- [fol. 171] tive power could not be furnished on the second day of October, 1918 and that said United States Railroad Administration could not give him any information definitely as to when it could furnish said cars and motive power, and plaintiff further alleges that it was impracticable by reason of the scarcity of food to retain said cattle within five or six miles of the town of Glasgow, awaiting the furnishing of cars and motive power by the United States Railroad Administration, and that it was necessary to drive said cattle to plain-

tiff's ranch on Buggy Creek about eighteen miles north and west of Glasgow and retain the same closely herded until such time as the United States Railroad Administration could furnish cars for the transportation of said cattle and would receive the same, and that said United States Railroad Administration negligently, carelessly, wrongfully, and unlawfully refused and failed to receive and accept said cattle and to furnish the cars and motive power for the transportation thereof until on or about the sixteenth day of October, 1918.

Plaintiff further alleges that by reason of such wrongful, negligent, careless and unlawful acts of said United States Railroad Administration he was damaged in the sum of Sixteen Hundred Fifty Dollars ($1,650.00) by reason of the fact that the cattle, while being closely herded and off of their accustomed range and in the driving of them [fol. 172] from plaintiff's ranch back to Glasgow on or about the fifteenth day of October, 1918, become shrunken in weight and became gaunt and emaciated and greatly deteriorated in their reasonable value and further alleges that he was damaged in the sum of One Thousand Three Hundred Forty-five dollars ($1,345.00) by reason of the fact that had said cattle been accepted on the second day of October, 1918, they would have been sold upon the market of Chicago on or about the eighth day of October, but inasmuch as they were not sold on the market until on or about the twenty-second day of October, 1918 at Chicago he was compelled to accept for said cattle much less than he would have received on or about the eighth day of October, 1918 and that by reason of the above mentioned acts of the United States Railroad Administration the plaintiff has been damaged in the aggregate sum of Twenty-nine Hundred Ninety-five dollars ($2,995.00) no part of which sum has been paid and which he seeks in this action to recover, with interest.

The defendant in its answer admits that certain cars were ordered, but not by the plaintiff, on or about the twenty-third day of September, 1918 to be furnished on or about the 2nd day of October, 1918, and denies that the agent of the United States Railroad Ad- [fol. 173] ministration at Glasgow promised or agreed on behalf of said Railroad Administration to furnish said cars for loading on October 2d or any other date, and admits that cars were not furnished on the second day of October, 1918 and were not loaded until about October 16, 1918, and alleges that the cars were furnished within a reasonable time and denies all the other allegations of plaintiff's complaint except the allegations respecting the right of the plaintiff to maintain this action against the above named John B. Payne which is admitted. The plaintiff denies in this reply that the cars were furnished within a reasonable time after the order was placed.

No. 2. If you find for the plaintiff in this action, you will allow him such sum as will reasonably compensate him for loss, if any, sustained by him by reason of shrinkage of said cattle, if any, during the time they were held by him after the said United States Railroad Administration should have received them, and in addition to such sums you should allow him such amount as will compensate him for

loss, if any, by reason of the decrease in the market value of said cattle between the time when same would have arrived at Chicago market and the time they did actually arrive.

No. 3. To entitle the plaintiff to recover in this action, it is necessary for him to prove by preponderance of the evidence that he was [fol. 174] the owner and in the possession of the cattle, or some of them, mentioned in his amended complaint, on or about the 23rd day of September, 1918; that the agent of the United States Railroad Administration promised to furnish the cars and motive power which it is admitted plaintiff ordered, or that the period between the 23rd day of September, 1918 and the second day of October, 1918 was a reasonable time within which the United States Railroad Administration should furnish said cars and motive power; and that plaintiff has been damaged in one or more of the respects set forth in his amended complaint, and if plaintiff has proven such facts by preponderance of the evidence your verdict should be in his favor in such sum as under these instructions and the evidence you determine he is entitled to recover, but not in any event in excess of $2,995.00 and interest at the rate of eight per cent per annum from the date of the commencement of this action, to-wit, August 6th, 1920. Interest, however, is solely in the discretion of the jury.

No. 4. If you believe from the evidence in this case that the agent of the United States Railroad Administration at Glasgow, Montana, promised and agreed with plaintiff to furnish plaintiff a suitable number of cars for the transportation of plaintiff's cattle commencing on the 2nd day of October, 1918, it was the duty of the United States [fol. 175] Railroad Administration so to do and it cannot escape liability on the ground that it did not have a sufficient number of suitable cars available to furnish the same to the plaintiff on said date.

No. 5. It is the duty of a common carrier to furnish stock cars to a shipper of livestock within a reasonable time after the order therefor is placed with said common carrier. If in this case, even though you should find that there was no contract between the United States Railroad Administration and the plaintiff for the furnishing of said cars on the 2d day of October, 1918, and you should believe from the evidence that said cars were not furnished to the plaintiff within a reasonable time after such order was placed, by the plaintiff, if same was so placed, you will then find that the United States Railroad Administration breached its duty to the plaintiff.

No. 6. If you find for the plaintiff herein, you may in your discretion allow him interest on such sum as you find him entitled to at the rate of eight (8) per cent per annum; from and after the 6th day of August, 1920, the date of the commencement of this action to the date of your verdict.

No. 7. You are instructed, however, that the mere fact that exhibit A in this case bears the name of Stephens & Cornwell, by Stephens, is

[fol. 176] not sufficient evidence from which you may find that the order was a joint order.

No. 8. Before you can find that any order placed by the plaintiff, R. L. Cornwell, with the United States Railroad Administration for cars on the 23rd day of September, 1918 was a joint obligation within the meaning of these instructions, you must find that the legal interest of himself therein was joint with James R. Stephens, and if such obligation may appear to be joint by its terms, the said Cornwell may nevertheless maintain this action, if in fact the legal interest therein is several, and if he was the only person interested in the cattle involved in this action and in the proceeds thereof and in the damages, if any, sustained by the acts of the United States Railroad Administration, then he may maintain this action.

No. 9. The burden of proof is on the plaintiff to show that shrink, if any, or other damage, if any, to the cattle was caused by an act or neglect, if any, of defendant, and not by any act or neglect of plaintiff or his agents, representatives or employees.

No. 10. Negligence is the failure to exercise such reasonable care and prudence, under all the circumstances, as the average reasonably prudent person, under such circumstances, would ordinarily exercise; the test is not whether the defendant failed, if at all, to exercise [fol. 177] extraordinary care, if any, or failed, if at all, to exercise reasonable care and prudence, or such reasonable care and prudence as the average reasonably prudent person could, should, or even would, exercise, under all the circumstances. The test is whether the defendant exercised such reasonable care and prudence as the average reasonably prudent person, under all the circumstances, would ordinarily have exercised.

No. 11. Before a carrier can be held liable for a failure to furnish cars on request, or for failure to accept or transport cattle tendered to it for shipment, the shipper must first have given the carrier reasonable notice of the shipper's need for cars and of his intention to tender the cattle for shipment, and the carrier is under no obligation to furnish cars or to accept cattle tendereed to it for shipment until such reasonable notice has been given and a reasonable opportunity afforded the carrier to furnish said cars and to accept said cattle for shipment.

No. 12. If you find from the evidence that the only order, request, contract, or direction, if any, for the furnishing of cars, was a joint order, request, contract or direction, if any, purporting to be made by or on behalf of the plaintiff and Stephens jointly and not severally, for cars for the joint use of or disposition by the plaintiff and the said Stephens, and not for the several use of or disposition by the [fol. 178] plaintiff, then you must return a verdict for the defendant.

No. 13. If there was no express agreement to furnish cars on a date named, but you find that the only obligation of defendant was to furnish cars within a reasonable time, then it was not the duty of

defendant to send word to plaintiff as to whether or not the cars would be on hand on any date named by plaintiff. Plaintiff would assume any risk of damage by disposing of his cattle without inquiring of defendant and receiving advices that the cars would be on hand.

No. 14. A carrier is not bound by the mere direction of a shipper to have cars at a station for loading on a date fixed by the shipper. At least in the absence of a special express contract to furnish cars on the date named by the shipper; a carrier is merely obligated to furnish cars within a reasonable time under all the circumstances after the order is placed and not necessarily to furnish them on the date fixed by the shipper unless you find that the date was a reasonable time under all the evidence.

No. 15. Even though you find that the animals shrank or were otherwise damaged from the time they arrived at the ranch within about five miles of Glasgow until they returned there, you cannot award the plaintiff any compensation for this shrink, if any, or other [fol. 179] damage, if any, if your verdict is for the plaintiff, unless you further find that it was caused by defendant and not by any act or neglect of the plaintiff or his agents or representatives.

No. 16. The defendant is not liable for damages, if any, to the animals not proximately caused by his, defendant Director General's own acts or neglects, if any, or those, if any, of his representatives. The only damages, if any, for which recovery may be had by the plaintiff, if your verdict is for the plaintiff, is such as you may find was proximately caused by some act or neglect of defendant.

No. 17. In this case the burden is upon the plaintiff to prove the truth of each material allegation of the complaint by a preponderance of the evidence.

No. 18. You are instructed:

1. That the power of judging of the effect of evidence is not arbitrary, but it is to be exercised with discretion and in subordination to the rules of evidence.

2. That you are not bound to decide in conformity what declarations of any number of witnesses which do not produce conviction in your minds as against a less number or against a presumption or other evidence satisfying your minds.

3. That a witness false in one part of his testimony is to be distrusted in others.

[fol. 180] 4. That the evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and therefore,

5. If weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence offered would be viewed with distrust.

No. 19. The jury are instructed that the preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact, or state of facts. In determining upon which side the preponderance of evidence is, the jury should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the suit; the probability or improbability of the truth of their several statements, in view of all the other evidence, facts and circumstances proved on the trial; and from all these circumstances determine upon which side is the weight or preponderance of the evidence.

Preponderance means the greater weight, and by fair preponderance of the evidence is meant that the testimony of the party who [fol. 181] has the affirmative is sufficient to fairly outweigh the testimony of the other party upon that issue. The law lays upon the party having the affirmative of an issue, the burden of satisfying you of the correctness of his position by evidence which outweighs the evidence of the opposing party; unless he does so he cannot recover. In other words, if the evidence is evenly balanced, or after carefully canvassing all of the testimony it appears that the greater weight is against the party having the affirmative, your verdict should be against him. You are not bound to regard the weight of the evidence as evenly balanced where witnesses testify directly opposite to each other. In your deliberation you should bear in mind all these rules concerning the weight of the evidence.

No. 20. By no remark made during the trial, nor by these instructions, does or did the Court express an opinion as to the facts in this case.

You are the sole judges of the weight of the testimony and the credibility of the witnesses, and it is solely and exclusively for you to determine the facts, and this you must do from the evidence, and then apply the law as stated in these instructions.

You should take the law from the Instructions of the Court alone and you should not give any weight to statements of counsel as to [fol. 182] what the law is, except that counsel may argue and comment upon the law of the case as given in these instructions.

Statements of counsel are not to be regarded by you as evidence and you will disregard such statements, if any may be or have been made, not supported by the evidence received upon this trial.

You should consider these instructions all together and you have no right to consider any part or portion of them to the exclusion of other portions.

You are to take into account in weighing the testimony of any witness, his interest or want of interest in the result of the case, his appearance upon the witness stand, his manner of testifying, his apparent candor or want of candor, whether he is supported or con-

tradicted by the facts and circumstances in the case as shown by the evidence. You have a right to believe all the testimony of a witness or believe it in part and disbelieve it in part, or you may reject it altogether as you may find the evidence to be. You are to believe as jurors under the instructions of the Court and the evidence what you would believe as men, and there is no rule of law which requires you to believe as jurors what you would not believe as men.

In your consideration of this case you will only consider the testimony of the witnesses upon the witness stand and such exhibits as [fol. 183] have been admitted in evidence. No juror shall allow himself to be influenced by anything which he may have seen or read outside of the evidence and exhibits in this case.

No. 21. The jury are instructed that neither by these instructions nor by any remark made by the court during this trial, nor by the blank forms of verdict submitted for your assistance, does or did the court intimate, or wish to be understood as giving, an opinion as to what are the facts in this case, or what are not the facts therein. It is solely and exclusively for the jury to find and determine the facts, and this they must do from the evidence, and, having done so, then apply to them the law as stated in these instructions.

No. 22. Two-thirds of your number are sufficient to bring in a verdict.

When you retire to your jury room, you will select one of your number foreman, and he will sign your verdict.

Be it further remembered, that thereafter the jury retired to consider of their verdict, and returned into court with a verdict in favor of the plaintiff and against the defendant, in the sum of Two Thousand Nine Hundred Ninety-five & No/100 Dollars ($2,995.00), and interest at the rate of eight (8) per cent per annum from the commencement of the above entitled action; and thereafter, and on [fol. 184] the 12th day of March, A. D. 1921, judgment was entered upon said verdict; and thereafter, and within ten (10) days after service upon the defendant of Notice of Entry of said Judgment, and on, to-wit, the 18th day of March, 1921, the defendant duly served and filed herein his Notice of Intention to Move for a New Trial herein; and thereafter an order was made by the above entitled Court pursuant to stipulation, extending the time within which the foregoing Bill of Exceptions might be served, to and including the 12th day of June, 1921.

And, now, within the time allowed by law and the stipulations of the parties and the orders of the above entitled Court, comes the defendant and presents the foregoing as and for his Bill of Exceptions to the rulings made and proceedings had on the trial of the above entitled cause, or to be used on motion for a new trial thereof, and prays that the same may be signed, settled and allowed as such.

I. Parker Veazey, Jr., W. L. Clift, & R. H. Glover, Attorneys for Defendant.

Due service of the foregoing Bill of Exceptions is hereby acknowl-
[fol. 185] edged, and receipt of a true copy thereof is hereby admitted this 4th day of June, A. D. 1921.

Norris, Hurd, Rhoades & Hallett, Attorneys for Plaintiff.

STIPULATION AND ORDER SETTLING BILL OF EXCEPTIONS

It is hereby stipulated that the foregoing Bill of Exceptions is true and correct, and that the same may be signed, settled and allowed as prayed for therein, without further notice to the parties hereto.

Norris, Hurd, Rhoades & Hallett, Attorneys for Plaintiff.
Hurly, Kline & Slattery and I. Parker Veazey, Jr., W. L. Clift, and R. H. Glover, Attorneys for Defendant.

STATE OF MONTANA,
County of Valley, ss:

The foregoing Bill of Exceptions of the Defendant, duly and regularly served, having been duly and regularly presented to the undersigned, the judge of the above entitled court, who also tried said cause, for settlement, and no amendments having been presented or served to the same; and the parties having stipulated that said [fol. 186] Bill of Exceptions may be settled as above, and the matter of the final settlement of said Bill of Exceptions coming on now regularly to be heard, and pursuant to the stipulation between the parties.

This is to certify that the foregoing Bill of Exceptions is true and correct, and sets forth so much of the substance of the evidence adduced or offered on the trial of said cause or received in evidence as is necessary clearly to present for review the objections made and exceptions taken set forth in said bill of exceptions, and that where the evidence appears therein by questions and answers the same is necessary clearly to present for review the objections made and exceptions taken at said trial, and the grounds thereof, and the said Bill of Exceptions is hereby settled, signed and allowed as and for the Bill of Exceptions of the said defendant to the rulings made and proceedings had on the trial of said cause, and to be used on motion for a new trial.

Dated at Glasgow, Montana, this 30 day of July, A. D. 1921.

C. D. Borton, Judge of the District Court of the Seventeenth Judicial District of the State of Montana, in and for the County of Valley, Before Whom the Above-entitled Cause [fol. 187] was Tried.

[File endorsement omitted.]

In District Court of Valley County

Order Denying New Trial—Filed Oct. 3, 1921

This matter coming on regularly for hearing and the Court being duly advised in the premises.

The Motion of the said defendant for a new trial is hereby denied.

Dated this 29 day of September, 1921.

C. D. Borton, Judge.

[File endorsement omitted.]

In the District Court of the Seventeenth Judicial District of the State of Montana in and for the County of Valley

[Title omitted]

[fol. 188] Notice of Appeal—Filed Nov. 14, 1921

To the plaintiff in the above-entitled cause, R. L. Cornwell, and to Messrs. Norris, Hurd, Rhoades & Hallett, as attorneys for the plaintiff:

You, and each of you will please take notice: That the defendant in the above entitled cause, James C. Davis, as Agent of the President of the United States under the Transportation Act of 1920 (substituted herein as defendant as successor to and in the place and stead of John B. Payne, as Agent as aforesaid), hereby appeals to the Supreme Court of the State of Montana, from the Judgment rendered in the above entitled cause on the 12th day of March, 1921, by the District Court of the Seventeenth Judicial District of the State of Montana, in and for the County of Valley, upon a verdict of a jury, in favor of the plaintiff and against John B. Payne, as agent as aforesaid, assessing plaintiff's damage at Two Thousand Nine Hundred and Ninety-five Dollars ($2,995.00) and interest, which said judgment is in favor of plaintiff and against the said John B. Payne as agent as aforesaid, for the principal sum of Three Thousand One Hundred Thirty-eight and 71/100 dollars ($3,138.71) and is the final and only judgment in said cause. Said [fol. 189] appeal is taken from said judgment and from the whole thereof.

You and each of you will please take further notice: That the defendant, James C. Davis, as agent and defendant as aforesaid, also hereby appeals to the Supreme Court of the State of Montana from the order made in said cause, ordering that the motion of the defendant in said cause, for a new trial of said cause, be denied and denying a new trial thereof, which said order was made, in said cause, on the 29th day of September, A. D. 1921, and was filed in said Court and Cause on the 3rd day of October A. D. 1921, the same being the only order in said cause finally disposing of said

motion for a new trial. Said appeal is taken from said order and from the whole thereof.

I. Parker Veazey, Jr., W. L. Clift, and R. H. Glover, Attorneys for Defendant.

Indorsed: Service of within notice admitted November 14, 1921. Norris, Hurd, Rhoades, & Hallett, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 190] UNITED STATES OF AMERICA,
State and District of Montana, ss:

Office of the Clerk of the Supreme Court of Montana

CLERK'S CERTIFICATE

The undersigned, as Clerk of the Supreme Court of the State of Montana, does hereby certify and declare as such Clerk that attached hereto is a full, true and correct copy of the following papers, entries and documents as the same appear of record in the office of the undersigned as such Clerk, in that certain cause filed in said Supreme Court and entitled R. L. Cornwell, Respondent, vs. James C. Davis, as Agent of the President of the United States under the Transportation Act of 1920, Appellant, Cause No. 5003, to wit:

(1) A copy of the transcript on appeal filed by Appellant;

(2) A copy of the opinion and Judgment of the Supreme Court of the State of Montana;

(3) A Copy of the Petition for Rehearing filed by the Appellant;

(4) A Copy of Respondent's response to said Petition for a Rehearing;

(5) A copy of the Order of said Court Denying said Petition for a Rehearing,

which said papers, entries and documents constitute a full, true and correct copy of the entire transcript of the record of said cause in the said Supreme Court, including all the proceedings in said Supreme Court of the State of Montana.

In witness whereof, the undersigned has hereunto set his hand and affixed the seal of the said Supreme Court of the State of Montana, this 4 day of April, A. D. 1923.

Dana M. Easton, as Clerk of the Supreme Court of the State of Montana.

[fol. 191] STATE OF MONTANA:

IN THE SUPREME COURT, DECEMBER TERM, 1922

No. 5003

[Title omitted]

Submitted January 22, 1923; Decided February 10, 1923

OPINION—Filed Feb. 10, 1923

[fol. 192] Mr. Justice HOLLOWAY delivered the Opinion of the Court.

In his complaint plaintiff alleges that on September 23, 1918, he was the owner of 213 head of cattle which he desired to ship to market; that the cattle were then upon the public range, some thirty-five miles north Glasgow, Montana; that on the day named he ordered from H. R. Cahan, the local agent of the defendant at Glasgow, nine suitable cattle cars to be at Glasgow on October 2nd for the transportation of his cattle to the Union Stock Yards at Chicago; that defendant's agent then and there agreed with and promised plaintiff that the cars would be furnished at the time and place designated; that the time intervening between the dates mentioned was a reasonable time within which defendant should have furnished the cars; that in reliance upon defendant's promise, plaintiff caused his cattle to be rounded up and driven to a point near Glasgow, where they arrived on October 1st; that he immediately caused notice to be given to defendant that he would be ready to load his cattle on October 2nd; that defendant failed, neglected and refused to furnish the cars on October 2nd and did not furnish them until October 16th; that plaintiff was compelled to return his cattle to the range for feed and, because of the extra handling, the cattle were greatly reduced in weight and, because of the delay, he was forced to sell upon a market lower than the market prevailing at the time when the cattle would have been sold if the cars had been supplied on October 2nd.

The answer puts in issue most of the materials allegations of the [fol. 193] complaint; however, it is admitted that on September 23, 1918, certain cars were ordered for Glasgow for October 2nd and that the cars were not furnished until October 16th. Defendant denies that he agreed to furnish the cars on October 2nd or on any other specified date, and alleges that the cars were furnished within a reasonable time after they were ordered.

The trial of the cause resulted in a verdict for plaintiff, and the defendant appealed from the judgment entered thereon and from an order denying his motion for a new trial. In the meantime Director General Payne was superseded and James C. Davis, agent under the Transportation Act of February 28, 1920, was substituted as defendant.

At the time these cars were ordered and for more than a year thereafter the principal railways of this country, including the Great Northern Railway, were under the control of the United States in the exercise of its war powers. The management was lodged in the Director General, who acted through regional directors and through local officers and agents. The rolling stock theretofore belonging to the respective lines of railway was pooled and then apportioned among the several lines as the administration adjudged best suited to meet the exigencies of the times. During September and October, 1918, there was an extraordinary demand for equipment and a serious car shortage.

It is the contention of the defendant that, under these circumstances, the local agent at Glasgow did not have authority to bind the railway administration by his promise to furnish to any one shipper a given number of cars at a designated time and place; that the apportionment of equipment to the different regions and through each region to the different lines within it was a matter of governmental regulation beyond review by the courts; that de- [fol. 194] fendant could not be required to discriminate in favor of one shipper and against another, and that the ultimate duty which could be imposed upon him was to furnish to plaintiff his fair proportion of the cars available under the distribution made to the Great Northern line, and that liability could be predicated only upon a breach of that duty.

It must be conceded that it was a primary purpose of the Commerce Act to prohibit unjust discrimination among shippers, and if the contract upon which plaintiff relies contemplated unusual service, advantage or preference to him not open upon equal terms to other shippers, it was illegal and beyond the power of the agent at Glasgow to make (Chicago & Alton R. Co. v. Kirby, 225 U. S. 155, Anno. Cas. 1914 A, 501 Wall v. Northern Pac. Ry. Co., 53 Mont. 81, 161 Pac. 518); but there is not anything upon the face of a contract to furnish nine cars at Glasgow on October 2nd to suggest that plaintiff would receive more than his fair proportion of the cars available at the time, or that the service for which he contracted was not open to all others upon equal terms. It is the general rule that such a contract does not violate the Commerce Act (Chicago, R. I. & P. Ry. Co. v. Beatty, 42 Okla. 528, 141 Pac. 442). In Oregon R. & N. Co. v. Dumas, 181 Fed. 781, the Circuit Court of Appeals for the Ninth Circuit, in passing upon a contract similar to the one now before us, said: "It is true that a discriminatory con- "tract between a quasi public corporation, such as a railroad com- "pany, and its patrons, is held to be void because of the resulting "unreasonable advantage to one over another, whereas, in fact, all "have a moral and legal right to equality of treatment. But it is "nevertheless well settled that a carrier may bind itself by contract [fol. 195] "to furnish a shipper a specific number of cars at specific "times and places, and that damages may be recovered by the ship- "per for the carrier's failure or delay to carry out the contract."

The decision in Chicago & Alton Ry. Co. v. Kirby, above, is not in conflict with the views herein expressed. In that case the plain-

tiff's declaration disclosed affirmatively that the contract involved, provided for preferential service to the shipper and that for that reason it was held to be void.

It could not be controverted that under private control the Great Northern Company's agent at Glasgow would have authority to make the contract in question and bind the company thereby. (Wood v. Chicago, M. & St. P. Ry. Co., 68 Ia. 491, 27 N. W. 473; Stewart v. Chicago, R. I. & P. Co., 172 Ia. 313, 151 N. W. 485; Easton v. Dudley, Receiver, 78 Tex. 236, 14 S. W. 583; 1 Elliott on Railways, (3d ed.), sec. 345; 10 C. J. 218), and it was the intention of the Congress, as indicated by section 10 of the Federal Control Act (40 Stat. 451), that each transportation system under federal control should continue liable substantially as it was under private control, any suit, however, to be brought against the Director General as the legal person responsible for the carrier's acts. (Hines v. Dahn, 267 Fed. 105; Missouri Pac. Ry. Co. v. Ault, 256 U. S. 554; Dampskibs Actiesselskabet Sangstad v. Hustis, 257 Fed. 862.) It follows that the contract in question is valid and binding upon the defendant. (10 C. J. 218.)

Counsel for defendant cite Underwood v. Hines, 222 S. W. 1037, in support of their contention that the local agent of the Director General has no authority to make a contract such as the one involved in the present litigation. In that case the court said: "A "contract absolute and unconditional, to have cars ready for plain-[fol. 196] "tiff's use at a certain place and date, irrespective of "the government's needs or of the general service to the public, is "one the station agent had no authority to make." That statement, however, is explained somewhat in the concluding paragraph of the opinion wherein the court said: "The reason that no cars were ob-"tainable until the date they were obtained was because of govern-"mental war needs and the imperative duty to give precedence to "shipments of the government; and therefore it was impossible to "have cars on hand for plaintiff's use on date specified. These facts "appearing in the case without controversy, the demurrer to the "evidence should have been sustained." We are not called upon to subscribe to or dissent from the views thus expressed. The Kansas City Court of Appeals which pronounced the judgment is not a court of last resort in Missouri; but in any event the facts recited in the opinion distinguish that case from the one now before us.

The number of cars available to the Great Northern line was a matter peculiarly within the knowledge of the defendant, his agents and subordinate officers in charge of that line, and assuming, without deciding, that defendant could be heard to say that the delay in furnishing the cars was occasioned by the war necessities of the government, that was a matter of defense which was neither pleaded nor proved. (Chicago etc. R. Co. v. Wolcott, 141 Ind. 267, 39 N. E. 451.)

Again it is argued that the so-called contract, if made, lacks the essential element of mutuality, in that it does not appear that plaintiff agreed to use the cars if furnished to him. This contention is devoid of merit. When plaintiff ordered the cars his agreement

to use them was necessarily implied, and this rule is recognized by [fol. 197] the authorities generally. (Clark v. Ulster & Delaware Ry. Co., 189 N. Y. 93, 81 N. E. 766, and cases cited in note 12 Anno. Cas. 885.)

A serious controversy arises over the character of the contract in question. It is the contention of plaintiff that he entered into a parol agreement with the defendant to furnish him nine cars on October 2nd. The defendant contends that the contract was in writing, was made with Stephens and Cornwell jointly, and that plaintiff may not maintain a separate action under the decision in American L. & L. Co. v. Great Northern Ry. Co., 48 Mont. 495, 138 Pac. 1102. Plaintiff testified that on September 23, 1918, he called at the office of the defendant in Glasgow and ordered from the agent Cahan nine 33-foot cattle cars to be at Glasgow on October 2nd for the shipment of his cattle to the Union Stock Yards at Chicago; that Cahan promised and agreed that the cars would be furnished at the time and place mentioned; that James R. Stephens and Rush Jacobson were present at the time, and that Stephens ordered eleven cars and Jacobson one car. In all essential particulars plaintiff was corroborated fully by the testimony of Stephens and Jacobson. For the defendant, M. R. Underwood employed as assistant cashier at the freight office in Glasgow during 1918, testified that on September 23rd plaintiff and Stephens came to the office and inquired for agent Cahan who was then not present; that they left the station and later Stephens returned and stated that he desired to place an order for cars, and that he (Underwood) wrote out an order which Stephens signed. That order, designated in the record "Exhibit A," reads as follows:

"Glasgow 9-23. W. E. B. Wolf Point: Please furnish 24 33-ft. "cars to load cattle for So. St. Paul Oct. 2nd, Shippers Stephens and "Cornwell. (Signed) R. H. Cahan, Agent. Stephens & Cornwell, [fols. 198 & 199] "by Stephens."

Cahan testified that he did not have any negotiations with plaintiff on September 23, 1918, and that his only knowledge of the transaction was obtained from the order, Exhibit A, which he caused to be transmitted to the chief dispatcher at Wolf Point. It appears further that the Cornwell cattle and the Stephens cattle were on the range together, that they were gathered together and driven to the stock yards at Glasgow together, and that they were shipped in twenty cars to Chicago under a joint shipping contract. There is evidence, however, that the cattle were separated in the yards at Glasgow; that plaintiff loaded his cattle in nine cars, and that Stephens loaded his in eleven cars.

There are other circumstances emphasized by counsel for the defendant, but they reflect only upon the credibility of the plaintiff and his witnesses.

There was not any evidence that Stephens and Cornwell were partners. The mere fact that "Exhibit A" was signed by Stephens would not warrant a finding that plaintiff had authorized the act, and cer-

tainly it cannot be said as a matter of law that plaintiff's acceptance and use of nine cars on October 16th for the transportation of his cattle to Chicago constituted a ratification of an order for twenty-four cars for shipment to South St. Paul. It is made apparent from the testimony that neither Stephens nor Cornwell contemplated shipping his cattle to South St. Paul. Stephens admits that he signed "Exhibit A," and his only explanation is that he presumes the agent asked him to do so. Plaintiff admits that the cattle went forward to market under a joint shipping contract, and his testimony is that he did not know why the shipment was billed out in the name of Stephens and Cornwell.

It is elementary that the contract to furnish cars may be by parol [fol. 200] or in writing (Pope v. Wisconsin Cent. R. R. Co., 112 Minn. 112, 127 N. W. 436; 10 C. J. 212), and that it is independent of the contract under which the shipment is actually made (Clark v. Ulster & Delaware Ry. Co., above). Whether the parol agreement existed in this instance was a question of fact for determination by the jury (Pope v. Wisconsin Cent. Ry. Co., above; 10 C. J. 215). It is not the province of this court to weigh the evidence or pass upon the credibility of the witnesses, and in view of the testimony of plaintiff, Stephens and Jacobson it cannot be contended that the finding that the parol agreement was made, is not supported by the record.

The other assignments have been considered but they do not present any reversible error.

The judgment and order are affirmed.

Affirmed.

Wm. L. Holloway, Associate Justice.

We concur: Lew. L. Callaway, Chief Justice. Charles H. Cooper, Albert J. Galen, Albert P. Stark, Associate Justices.

[fol. 201] IN THE SUPREME COURT OF THE STATE OF MONTANA

[Title omitted]

PETITION FOR REHEARING

Comes now the Appellant in the above entitled case, and respectfully petitions the Court for a rehearing of this cause on the following grounds:

1. In Specification III the Appellant urged error in refusing an instruction that, in this kind of an action, the jury could not review any errors in car distribution effected by the government, all over the country as a government, in allotting cars to each carrier, but that negligence would begin only after the distribution had been made by the government as a government to the government as a carrier by the Great Northern. In other words, the question of

negligence would be determined only by the inquiry whether the Federal Manager for the Great Northern and his Agents on the Great Northern were negligent in the distribution of the cars allot-ed [fol. 202] to that railroad, and the jury could not find the government negligent on the theory that, in distributing cars over the country, it did not award enough to the northwest or to the Great Northern. The Court, in its opinion, summarily disposes of this by a ruling not urged by either party and merely incorrectly says that "this raises the issue of war necessities, which was neither pleaded nor proven." In answer to this point, now for the first time urged, we would reply that war necesities were not at all an issue and could not, as a matter of law, be an issue, because, as a matter of law, of which the Court takes judicial notice without pleading, the government, for war necessities or otherwise, took over the railroads and both regulated them as a government, and ran them as carriers, and the jury could not, as a matter of law, pleading, or proof, review any distribution other than the distribution made by, and not to, the Great Northern Railway. The Court's expression, therefore, as the basis for denying this assignment, is not germane to this specification, aside from the fact that all this proof was fully gone into at the trial, and the Appellate Court alone, at this late day, now for the first time excludes it as not involved in the pleadings.

2. In Specifications I a & b, the Appellant assigns as error the refusal to instruct that an alleged promise by an agent for cars is not binding unless the shipper impliedly agreed to load the cars, and, in Specification II b & c, the error involving objections to instructions making defendant liable for the mere promise of the [fol. 203] agent. The Court dismisses this contention by saying that the promise to load was necessarily implied. This must mean that the Court has incorrectly stated that this promise to load is implied in law, but, in fact, such a promise, if implied at all, is implied in fact and it was for the jury to determine on all of the evidence, whether or not this implication of fact was proper under proper instructions. The trial Court, however, instructed the jury that a counter promise, implied or otherwise, was not necessary.

3. In Specifications V b to Vk, the defendant presents errors in instructions, given or refused, on the theory that there was a conflict in the evidence as to whether the contract was a several contract, or a *joing* contract. The Court dismisses this with the statement that the evidence was conflicting whether there was an oral several contract or obligation, or whether the contract or obligation was a joint one, either oral or as set forth in Exhibit "A," and the Court fails to comment at all upon the possibility that the jury may have found that the contract was a joint one, but was misled by the Court's instructions as to the effect of a joing contract, and by refusal of the Court to correctly guide them in this particular. The Court says that these specifications are immaterial because the jury has found the oral contract or obligation to be true. This is not so, and this argument is also one not heretofore advanced in the briefs but now here first urged by the Court, for the parties have

heretofore disputed over the law, it being conceded by them that, [fol. 204] if appellant's views on the law were correct, a reversal must follow.

The jury has not found any oral contract or obligation to be true. It has merely found for the plaintiff on erroneous instructions that, even if the contract or obligation was not a several oral order for 9 cars but was Exhibit "A," or an oral order joint in its terms, several suits could be maintained on the said obligation by private arrangements made between the shippers uncommunicated to the Railroad.

Preliminary Argument

In the oral argument in this case, the respondent stresses the statement that conflicts in proof, based upon substantial evidence in any case, are for the determination of the jury, and cases as far back as 5 Montana were cited to convince the Court that this undisputed proposition was and is the law of Montana. This proposition, not at all involved in this case, or disputed at anytime, has however been so insistently urged, that we think the Court has been hurried into assuming that something to the contrary is involved in Appellant's Specifications. Let us show, therefore, how a conflict in evidence in this case is helpful partly to respondent and partly to appellant, and may require some questions to be resolved in favor of the respondent, and necessarily requires some to be decided in favor of the Appellant.

Thus Appellant contended that it was entitled to a direct verdict because the uncontradicted credible evidence showed a written or [fol. 205] oral joint contract, and not a several oral contract. The Court however sustains respondent's views that the evidence was conflicting. With this view, the specification aforesaid necessarily fails because any such specification assumes necessarily every inference in the evidence in favor of the respondent.

But the evidence, as the Court points out, shows a conflict as to whether the contract was a several contract or was an oral or written joint contract like Exhibit "A," later attempted to be made several by private arrangement between the shippers uncommunicated to the railroad. This, therefore, required that the jury be instructed correctly as to how to handle this conflict. Here, they were erroneously instructed that, if they believed Exhibit "A" to be the contract or order for cars, or that the contract or order for cars was an oral joint one, they could still return a verdict for the plaintiff, if they found that this joint contract was modified by private arrangements between the shippers uncommunicated to the defendant. Here, if there is any substantial conflict, this requires reversal because of the giving of these instructions and the refusal to give correct instructions, for the general verdict does not show that the jury found there was an oral contract, but merely shows that the jury found either that there was an oral contract, or, that there was a joint contract, and that, by reason of erroneous instructions, incorrectly awarded results from that joint contract.

[fol. 206] Assume that a personal injury suit is brought. The issues are negligence on the part of the employer and negligence on the part of the plaintiff. The Court commits error in instructions on negligence and on contributory negligence. If the defendant can show that the evidence is uncontradicted in favor of the defendant on these issues, the defendant is entitled to a verdict, but the defendant's Motion for Judgment fails if there is any conflict in the evidence. Similarly, if the jury is erroneously instructed on the issue of negligence or on the issue of contributory negligence, a verdict for plaintiff must necessarily be reversed unless the plaintiff can show that there was no evidence justifying the submission of the issue on which the jury was erroneously instructed. In one case the conflict in evidence necessarily results in plaintiff holding a verdict in plaintiff's favor; in the other case, a conflict in evidence necessarily results in a judgment in plaintiff's favor being reversed because of errors in instruction in the handling of that conflict.

Any substantial conflict in evidence denies defendant the right to judgment, but at the same time it makes fatal to plaintiff's case an error in an instruction reviewing the law involved in that conflict in evidence. This is a Matter which the Court in this case has overlooked, and the plaintiff, in stressing the time worn rule that a conflict in the evidence is for the determination of the jury, has induced the court to rule that a conflict in the evidence makes erroneous instructions harmless.

[fol. 207] Conflicts in Evidence in This Case and Errors in Instructions on This Conflict

1. One conflict which arose in this case was whether there was an express promise to furnish cars. The question is whether the evidence shows that the plaintiff was entitled to base his recover upon an express contract for cars, or upon a breach of a common law obligation to furnish cars. The Plaintiff went to the jury on both theories, expressly stating that he was trying to recover on both theories. The jury's verdict does not show on which theory recovery was allowed. Hence errors in matters of instructions on the formation of an express contract are necessarily prejudicial, as the jury may have based their verdict on that theory. Another conflict in the evidence was, whether the shipper expressly promised to load the cars or did he impliedly promise to do so.

2. Another conflict was whether the Director General was negligent in not giving to the Federal Manager of the Great Northern enough cars, and another question, which the Bill of Exceptions especially recites, like the previous one, was a question for the jury, was whether the Federal Manager of the Great Northern was negligent in distributing the cars allotted to him.

The jury may have found that the Federal Manager and his Agents on the Great Northern were not negligent, and that there was no express contract, and no breach of any common law obligation by them but that the Director General was negligent in not giving the Federal Manager of the Great Northern enough cars. Hence errors in re-

[fol. 208] fusing to instruct the jury that they could not base a verdict on the alleged negligence of the Director General, but the question of negligence would begin only with the distribution of cars by, and not to the Great Northern would be necessarily prejudicial.

3. The third question on which there was a conflict in the evidence was whether the order was an oral order severally placed by the plaintiff, or whether it was a joing oral or written order, and, if the latter, whether the shippers by private arrangements between themselves, uncommunicated to the railroad, could sever their interests in such joint order. The jury may have found, and certainly probably did find, that Exhibit "A" was the order placed and that the order placed was a joint order, but they have returned a verdict for plaintiff because the Court instructed that, even if the order was a joint order, the shippers, by private arrangements between themselves uncommunicated to the Great Northern, could make the joint order several in effect, whereas, if the jury had been instructed that a joint order could not be converted into several orders by mere private arrangements between the shippers, the jury would have returned a verdict for the defendant. Hence, this conflict in the evidence makes these errors in giving erroneous instructions prejudicial.

Argument on Three Points Involved

We thus present in this Petition for a Rehearing (1) arguments on the matter of car distribution by the government, (2) arguments on the express contract to furnish cars, and (3) argument on [fol. 209] erroneous instructions as regards the effect of a joint contract or obligation.

Car Distribution by the Government

The Plaintiff based this action on an express contract to furnish cars, under which, if valid, nothing is a defense except the question as to whether or not the express contract was made, and, also, on the ground of a breach of common law obligation to exercise reasonable care, that is to say, negligence. We cannot tell upon which ground the jury decided the case. The jury may have found that there was no express contract, but that the defendant was negligent. As regards this last theory, the jury may have found that the government, as a carrier over the Great Northern, was negligent in furnishing cars properly distributed by the government, as a government, to that railroad. Or, the jury may have found that the government was negligent in its distribution to the Great Northern, but that its agents on the Great Northern were not negligent. The Court was asked to instruct the jury that it could not review the car distribution made to the Great Northern by the government as such, or find negligence on that basis, but was limited to the question as to whether the government as a carrier over the Great Northern was negligent through its agents on the Great Northern.

This was not an action for a negligent failure to give the parties that were shippers, information. In fact it was admitted by the

parties that the shippers were to come in for final advices before attempting to ship. The matter of notice to the shipper was not an issue or made an issue, and the plaintiff, suing for the loss of a [fol. 210] market, would have resisted its being an issue. The plaintiff's claim was that, notice or no notice, by reason of the breach of an express contract or of a common law obligation, the plaintiff lost a market for which he was entitled to damages irrespective of any notice by defendant.

In response to the defendants urging the error of the Court in refusing this instruction that the jury could not review car distribution made by the government to the Great Northern, and that the plaintiff could not found a cause of action on that alleged negligent distribution, the Court replies merely, that the defendant cannot be heard to say that the *dealy* was occasioned "by war necessities of the government", because this was "a matter of defense which was neither pleaded nor proved."

First, in answer to this, we would call attention to the fact that this was not a matter which was urged by Counsel on either side, and the Court has, therefore, offered this solution as a solution which has escaped the attention of Counsel on either side.

Second, as a matter of pleading, we would call attention to the fact that the proof went in without objections, and therefore, it is too late for anyone to contend that there is any defect in the pleadings. The proof shows (Tr. pg. 134-135) that proof was introduced making it a question of fact for the jury, as to whether or not the government, as a carrier over the Great Northern, was negligent in the distribution to the plaintiff and other shippers of the cars allotted [fol. 210½] by the government, and, second, proof was introduced making it a question of fact for the jury whether the Director General or Regional Director was negligent in not allotting sufficient cars to the Federal Manager of the Great Northern for the performance of its functions as a carrier over the Great Northern. As there was no objection to this proof, and the examination and cross examination was thorough, no question of pleading was involved.

Third, there was no issue of war necessities referred to by the Court. Doubtless the Court takes judicial notice of the fact that railroads were taken possession of by reason of war necessities, but we are not contending directly that this car distribution was a matter of war necessities, but that, as a matter of law, whether because of war necessities or business necessities, or with or without reason, the government did as a matter of law take possession of all cars, and as a governmental function, distributed them to each railroad and then operated each railroad as a carrier. This is a matter of law of which the Court takes judicial notice without pleading, and we contend that the Court cannot review the reasonableness or lack of reasonableness of this law, or of the action of the government as such, under this law. As well might the Court say, in a suit against the corporation, that it would not take judicial notice that the corporation was not liable, and that the corporation could not escape liability during Federal Control, without pleading and proof that the government took possession of the railroad and that

there was a war necessity for the passage of the Federal Control Law. [fol. 211] These things are all matters of judicial knowledge, requiring no pleading, because they cannot be put in issue.

Fourth, the proof shows, as stated, that the government, as a government, determined how many cars should be awarded to its representatives in operating the Great Northern as a carrier, and making a question of fact whether this was a negligent distribution or otherwise, and the proof also shows what was done by the government, in its position as a carrier, in using those cars on the Great Northern. The latter, negligence by the government as a carrier, or the use of the cars allotted to the Great Northern, was a proper basis of inquiry and could properly be the foundation of a cause of action. The former, a distribution of cars, not by the government as a carrier, but by the government as such, was not the subject of judicial inquiry and could not be the basis of a cause of action. The plaintiff on the other hand, meeting the proof as to the number of cars available to the government as a carrier over the Great Northern, inquires as to the number of cars available over the country, and therefore, available to the Director General, and seeks to found a cause of action on his alleged negligent failure to give the carrier sufficient cars. To meet this issue the defendant tenders an instruction, not as a defense to the action, but as defining negligence and the basis of the plaintiff's cause of action, to the effect that the jury in determining not what is a defense, but what is the proper [fol. 212] basis for a cause of action may not review the distribution to the Great Northern, but as a matter of law, can review only the distribution made by the Great Northern. Yet the Court rules that it was not error to refuse this instruction defining what could be a basis of the plaintiff's cause of action because the defendant had not pleaded this as a defense. Literally the plaintiff claimed that the proof showed, as something on which he wanted to base his cause of action, negligence on the part of the government in not distributing sufficient cars to the Great Northern, and the objection is now made that, though this was used favorably for the plaintiff as a basis for his cause of action and as a basis for arguring a verdict in his favor, and though it was proper for the plaintiff to argue to the jury that the jury could found a verdict for the plaintiff based solely on this alleged negligent distribution to the Great Northern, nevertheless, the defendant could not urge an error in an instruction given to this effect, or error in a refusal correctly to advise the jury as to the nature of the plaintiff's cause of action, because these contentions, made by the plaintiff as the basis of his cause of action, were not pleaded by the defendant as a defense.

It is manifestly unfair to permit proof to go in without objection as properly involved in the case, and to permit a plaintiff on cross examination, without objection, to bring in many facts showing the number of cars over the United States and showing whether or not [fol. 213] the government was negligent in the distribution of cars to various regions and thence to various railroads, and then, when the defendant seeks to have the effect of this evidence understood by

the jury, to refuse an instruction advising the jury that they cannot base negligence on such a distribution, and thereby deprive the defendant of a legal right of exoneration and give the plaintiff a right to argue before the jury an issue of negligence, which, as a matter of law, is denied to the plaintiff. It is manifestly unfair to a defendant to have this proof go in and to have the trial court permit the plaintiff to avail of it as basis of his cause of action, and for the appellate court to say that this erroneous use of the proof by the plaintiff, and the court's refusal to instruct the jury that the plaintiff could not found a cause of action upon it, and the plaintiff's argument to the jury founding a cause of action upon it, do not constitute error, because the defendant did not plead it.

We respectfully submit, therefore, that this matter having been gone into by both parties without objection, no question of pleading could possibly arise and that the Court has misconceived the true nature of the instruction as one not defining a defense which the Court says should have been pleaded, but as defining the limits of the plaintiff's cause of action, which, of course, would have no place in any pleading by the defendant. And we again call the Court's attention to its misconception on representing this as a defense of war necessities to be pleaded as a defense, where, as a mat-
[fol. 214] ter of fact, this matter arises not as a war necessity or as any necessity to be reviewed by the Court, but it arises solely as a matter of law under the Federal Control Act, as to what facts can be taken into consideration by the plaintiff as a basis for his cause of action.

As the jury may have found in their general verdict that the government as a carrier over the Great Northern, through the acts of the Federal Manager of that railroad or his agents, was not negligent, but that the government as a government through the Director General or Regional Director, in distributing cars to the northwestern region, and in the northwestern region to the Great Northern, was negligent, the refusal to give the instruction in question was clearly prejudicial.

Formation of Express Contract for Cars

Of course, before there can be a binding promise to furnish cars, it would be necessary to have a consideration, which in this case would be in the form of a promise to load cars. Contrary to the position taken at the trial, it is now conceded by the plaintiff that, before there could be a binding promise to furnish cars, there would have to be a binding promise to load the cars. But the appellate court now says that the error in instructing the jury in this regard and the error in refusing correct instructions in this regard are not impotant because, when an order to furnish cars is given, a promise to load them is necessarily implied.
[fol. 215] If the Court means that such a promise is implied as a matter of law, it is respectfully submitted that this is not true. Such a promise is not imposed as a legal obligation, but is one implied in fact if at all. The distinction between a contract implied in law

irrespective of the facts, and a contract implied in fact is important. The basis for such a counter promise is not that the law requires that the shipper load the cars, but that under all the facts, it is reasonable to imply, as a matter of fact, that the shipper impliedly promised to load the cars.

Here again there was a conflict in the evidence all along the line. The agent denied that he promised to furnish the cars. The evidence gave play also, to a question of fact as to whether it was the reasonable understanding of the parties that the shippers agreed to load the cars, though there was no proof that the shippers did so agree expressly, and it was distinctly admitted by both parties that before the arrangement was to be treated as final and the cattle were to be brought in, the shippers were to come in and notify the agent as to whether or not they would be ready to load on the day in question. It was at least a question of fact for the jury as to whether there was any intention to agree to load the cars on the day in question, since the shippers stated that, in the total number of cars ordered, they included some cars for their neighbors, who they thought might possibly desire to ship, a prediction which did not turn out to be true.

Suppose, for instance, that, pursuant to the understanding that the arrangement was not to be final, but that the shippers were to [fol. 216] come in and notify the agent later, whether or not they could ship on the day in question, the shippers had come in and notified the agent two days before that they would not be able to ship for a week, but the cars were in fact brought in by the railroad and were on hand. Could the agent have demanded that they ship or respond in damages? If the carrier had sued the shippers, could it be ruled as a matter of law that the preliminary arrangements were as a matter of fact so final that as a matter of uncontradicted evidence the shippers would be deemed to have impliedly agreed to load out on the day in question. Or, would not the shippers claim that it was at least for the jury's determination as to whether or not the understanding was merely preliminary, and that no legal obligation to load would arise until after the final arrangement and advice had been given.

As there was this conflict in the evidence, its solution rested with the jury under proper instructions, but the Court refused properly to instruct the jury and took away from the jury the question of the necessity of a promise on the part of the shippers, expressed or implied in fact on the ground that, as a matter of law, in the trial Court's opinion, such a counter promise was not necessary to make the agent's promise binding.

Here again, while the plaintiff urged at the trial that such a counter promise was not necessary and obtained the advantage, in the settlement of instructions, of foreclosing future argument by the [fol. 217] defendant to the jury as to the intention of the parties not to enter into any contract at that time, the Court now reverses plaintiff's position and suggests that such a promise is implied as a matter of law, when, at the most, such a promise made under given circumstances may be implied by the jury as a matter not of law, but of fact, and this question of fact was for the determination of

the jury. Here again the conflict in evidence makes the refusal to instruct the jury properly and the improper instruction of the jury reversible error.

Liability under a Joint or Several Contract

In Specification 8′ a and b, the defendant contended that the uncontradicted evidence showed that the order was a joint order, and therefore defendant was entitled to judgment. This contention was based upon the writings in the case and upon the express admissions of the shippers calling the transaction "the car proposition" and "that order of ours." But the Court finds that there was a conflict in the evidence and that this was for the determination of the jury. We do not ask for a rehearing on this, but abide by the Court's decision.

However, such a conclusion that there was a conflict in evidence for the jury's determination, makes it necessary to review Specifications a to k, but the Court does not pass on these at all.

The Court says that there was a conflict in the evidence, as to [fol. 218] whether there was an oral several order, or a written or oral order, joint in its terms. This is true. The Court then adds, that the jury has found in favor of the plaintiff and that this means that the jury has found that the order was a several oral order. This is not true.

Thus the jury may have found that the order was an oral several order for nine cars, the jury may have found that "Exhibit "&" was the order, or that the order was an oral joint order for 24 cars, the jury may have found that, this being the order, the plaintiff was nevertheless entitled to recovery because the Court erroneously instructed the jury that, even if the order was joint in its terms for 24 cars, the plaintiff could sue upon it severally, if the shippers, by private arrangements between themselves not communicated to the carrier, apportioned their interest in the order by awarding 9 cars to Cornwell.

Indeed it is unthinkable that the jury could find that the proof showed that separate orders were placed for nine and eleven cars, contrary to their signatures and contrary to their express admissions designating the transaction as "that order of ours" and inconsistent with the number of cars actually furnished. Who can say that the jury believed this evidence of the shippers so incredible that we argue, and the Court seriously considers, whether or not it even involved a conflict? Is it not more likely that the jury found that the order was a joint order for 24 thirty-three foot cars, and that the shippers' retention of the 33, but repudiation of the 24, was inconsistent with [fol. 219] itself? And is it not more likely that the jury found that the order was a joint order, and returned a verdict for the plaintiff because the Court advised that this would be proper if the shippers later, in Chicago or elsewhere, by private arrangements between themselves, apportioned these cars among themselves.

Clearly the Court cannot say how the jury reached its verdict, or what the jury found, the verdict being a general one, and, as this is

so, the defendant is entitled to a new trial if the case, based upon the conflict in evidence, was not submitted to the jury under proper instructions for the handling of the conflicting conclusions.

Thus, if the jury found that the order was a joint oral order, or written order, then the jury was incorrectly instructed for the reasons set forth in said Specifications, and the Court also committed error in refusing instructions correctly setting forth the law. How can it be said that these errors were harmless when they may have been, and probably were, the cause of the jury bringing in an adverse verdict, where, if the jury had been correctly instructed in accordance with the American Livestock case, the verdict would have been returned for the defendant?

The Court of course does not reverse the American Livestock case, because that case lays down trite law. That case being the law, and the jury having been advised directly in the teeth of that decision [fol. 220] on a vital matter in this case, how can the Court say that this was harmless error, or, determine for itself how the jury reached its general verdict?

Suppose a personal injury case involves a conflict in the evidence as to whether the defendant was guilty of negligence, or the plaintiff guilty of contributory negligence; a verdict is returned for the defendant, but the jury is incorrectly instructed on the issue of contributory negligence, too great a duty of care being imposed upon the plaintiff by the instruction. Could the defendant seriously contend that these errors in the instructions on contributory negligence were harmless, because the jury may have found its verdict in favor of the defendant on the ground that there was no negligence. If a special verdict was returned showing there was no negligence on the part of the defendant, this would cure the error, but if the verdict was a general one, it could not be determined whether the jury found that there was negligence, but brought in a verdict for the defendant because they were erroneously instructed on the law of contributory negligence.

So here the Court cannot determine that the jury found that an oral contract for nine cars *were* placed by Cornwell, in the absence of a special finding to this effect, for it is quite consistent with the general verdict that the jury found that the order was joint in its terms, but that defendant was liable, notwithstanding this finding, because of the erroneous instructions of the Court.

[fol. 221]

Conclusion

We respectfully submit therefore, that the Court has overlooked that this appeal was submitted to the Court:

1st. On the basis of there being no conflict in the evidence, and that, therefore, the defendant was entitled to judgment, and

2nd. On the basis that, if there was a conflict in the evidence for the determination of the jury, then the jury was incorrectly instructed as to the effect of the situation created under either of these conflicts.

This latter phase of the Specifications has been overlooked by t
Court.

It would seem that by reason of the plaintiff so seriously stressi
the time worn rule, that conflicts in evidence are for the determin
tion of the jury, the plaintiff has induced the Court to believe th
this time worn rule was the dispute in this case. We, of cours
never made any such contention or disputed this rule. But it is
equally time worn rule that, if there is a conflict in the evidence f
the determination of the jury, then an Appellate Court cannot dete
mine how the jury reached its general verdict, and the judgme
must be reversed if the jury was improperly instructed.

We respectfully submit that on the conflict in this evidence; 1
as to whether the carrier was negligent in its distribution over t
Great Northern System of the cars allotted to that system, and as
whether the government was negligent in its governmental functio
[fol. 222] in alloting cars to the Great Northern system, which ma
ters are expressly referred to in the Bill of Exceptions as makin
questions of fact for the jury, the Court has not at all passed up
the validity of the defendant's views that this alleged negligence
the government as a government, and not as a carrier, could not
used (not as a defense by the defendant) as the basis of a cause
action by the plaintiff;

2nd. That there was a conflict in the evidence as to whether
counter promise by the shippers to load the cars would reasonab
have been implied by the jury, and the jury should have been co
rectly instructed that, unless they found from all the circumstanc
that such a promise was reasonably implied, the plaintiff could n
recover;

3rd. That in the conflict in the evidence as to whether or not t
order was a several or oral order by the plaintiff for nine cars, or
joint oral or written order by both shippers, the jury was incorrect
instructed that, if they reached the latter conclusion, they could st
find for the plaintiff, and errors were also committed in refusing i
structions correctly stating what would be the legal effect of the
finding that the order was a joint one in its terms.

The effect of the decision in question is that, no error howev
gross in the settlement of instructions, or however grave is the i
justice done to a party thereby, is ever a ground for reversal, unles
as never can be done, a party can show how a general verdict w
[fol. 223] reached. This makes a jury trial a nullity, and instru
tions to a jury a useless ceremony, for a party, as in this case, ca
urge the trial court into clear error, and errors can be committed
the instructions given, and in the refusal of opposite instructions, a
then this error is not recognized because the defendant cannot poi
definitely as to how the general verdict was reached.

As well settled as the rule that a conflict in the evidence is f
the determination of the jury, is the law heretofore repeatedly la
down that, if a special verdict is filed, such a special verdict may cu
errors occurring in the course of the trial, but, if the verdict is
general one, then it is impossible to tell how the jury reached i

conclusion and a new trial must be granted to either party, if the other party has induced errors in the instructions to the jury, which may have contributed to the result. It has never been necessary for the Appellant to show how the jury reached its result, and that therefore the erroneous instructions caused the error, for this could never be done. All that has ever been required, or can be required, is that defendant show that errors in instructions were committed which may have been substantially effected — the result.

[fol. 224] Thus if conflicting instructions are given, it is well settled that this requires a reversal. Though here again, the defeated party could not state which of the two instructions were heeded.

I. Parker Veazey, Jr., W. L. Clift, and R. A. Glover, Attorneys for Appellant.

[fol. 225] IN THE SUPREME COURT OF THE STATE OF MONTANA

[Title omitted]

RESPONSE TO APPELLANT'S PETITION FOR REHEARING

Petition for rehearing has been filed herein on behalf of appellant. This action was carefully briefed by both parties to the action and oral arguments presented to the Court. In our response to the appellant's petition for rehearing we do not feel it incumbent upon us to go over again the matters heretofore briefed and argued and decided by this Court. A petition for rehearing is not the proper place for such argument.

Three questions are raised by this petition:

1. The matter of car distribution by the government.

2. The express contract to furnish cars.

3. Instructions as regards the effect of a joint contract or obligation.

[fol. 226] These matters will be taken up in the order above set forth.

1. Car distribution:

Appellant's offered instruction No. 24 is as follows:

"You cannot review any car distribution made by the Director General himself or by his representatives determining general question of distribution over the United States. In matters of car distribution you can find the Director General negligent only if you find that his representatives operating the railway prior to Federal operation known as the Great Northern Railway were negligent in their distribution of cars which he allotted to them or allowed them to use."

Under this specification the following matters were argued by appellant:

1. Power of agent to contract to furnish cars. (Brief pp. 47-52.)

2. Conclusiveness of car distribution by the Government. (Brief pp. 52-58.)

In passing upon the first of the above matters Justice Holloway said:

"It could not be controverted that under private control the Great Northern Company's agent at Glasgow would have authority to make the contract in question and bind the company thereby (Wood v. Chicago, M. & St. P. Ry. Co., 68 Ia. 491, 27 N. W. 473; Stewart v. Chicago, R. I. & P. Co., 172 Ia. 313, 151 N. W. 485; Easton v. Dudley, Receiver, 78 Tex. 236, 14 S. W. 583; 1 Elliott on Railways, (3d ed.), sec. 345; 10 C. J. 218), and it was the intention of the Congress, as indicated by section 10 of the Federal Control Act (40 Stat. 451), that each transportation system under fed-[fol. 227] eral control should continue liable substantially as it was under private control, any suit, however, to be brought against the Director General as the legal person responsible for the carrier's acts. (Hines v. Dahn, 267 Fed. 105; Missouri Pac. Ry. Co. v. Ault, 256 U. S. 554; Dampskibs Actieselskabet Sangstad v. Hustis, 257 Fed. 862.) It follows that the contract in question is valid and binding upon the defendant (10 C. J. 218)."

In passing upon the second matter he said:

"The number of cars available to the Great Northern line was a matter peculiarly within the knowledge of the defendant, his agents and subordinate officers in charge of that line, and assuming, without deciding, that defendant could be heard to say that the delay in furnishing the cars was occasioned by the war necessities of the government, that was a matter of defense which was neither pleaded nor proved. (Chicago etc. R. Co. v. Wolcott, 141 Ind. 267, 39 N. E. 451.)"

The quotations from Justice Holloway's opinion pass directly upon the matters argued by appellant and respondent, and follow to a large extent the reasoning and authority of respondent's brief. (Brief pp. 8 and 9.)

Only the finding of this Court upon the second point above is apparently attacked by appellant in the Petition for Rehearing. In his argument upon this point counsel overlooks several factors determinative of the question. If the Great Northern had not been allotted sufficient cars to care for its needs then it and its agents knew that fact when the promise of cars was made. "That was a matter peculiarly within the knowledge of appellant." The appellant did not plead that sufficient cars were not allotted, due to "governmental war needs," nor was any proof introduced that such [fol. 228] were not allotted. Evidence was introduced showing a

method of distribution and a large demand, but no evidence was adduced showing any great and sudden shortage or change in allotment between the time of the order, when appellant's agent assured respondent that the cars would be on hand, and the time for delivery. Under such circumstances it seems clear that the decision of the court upon the question is correct and no ground or reason for rehearing exists.

2. Express Contract for cars:

The opinion of Justice Holloway upon this point would seem to cover the question in a satisfactory manner. He says:

"Again it is argued that the so-called contract, if made, lacks the essential element of mutuality, in that it does not appear that plaintiff agreed to use the cars if furnished to him. This contention is devoid of merit. When plaintiff ordered the cars his agreement to use them was necessarily implied, and this rule is recognized by the authorities generally. (Clark v. Ulster & Delaware Ry. Co., 189 N. Y. 93, 81 N. E. 766, and cases cited in note 12 Anno. Cas. 885.)"

The additional fact was developed that respondent did load the cars ordered by him. (Tr. p. 59, l.-26 to p. 60, l. 1). Under such circumstances argument as to whether or not there was or was not a contract to load the cars ordered becomes academic as would an instruction on the matter. The evidence showed that respondent was ready, willing and able to load the cars on October 2nd. This apparently satisfies the contention of appellant herein. In any event, under the evidence, the sole question was whether there was [fol. 229] contract between Cornwell and appellant for certain cars on a certain day. The jury said there was and this finding has been approved by this Court. The additional implied agreement to load is, therefore, beside the point. We must agree, of course, that there was such an implied agreement but such decision is hardly pertinent or controlling upon the questions involved in the case. A reading of appellant's petition so far as it concerns this point is conclusive upon the question that discussion of what might or might not have happened in the event the cars were ready on October 2nd is highly speculative and to say the least academic. In other words, appellant cannot be allowed to rob respondent of his right to damages by idle speculation upon what might have happened had appellant lived up to its contract. In the words of the Supreme Court, the specification is devoid of merit.

3. Liability under a joint or several contract:

In the brief and oral argument upon this feature of the case respondent urged that the evidence being conflicting as to the nature of the contract, the finding of the jury was conclusive. This theory was adopted by the Supreme Court in its decision. The distinction between the case herein presented and that involved in the

American Loan & Livestock Company case is obvious, and was pointed out in our brief.

[fol. 230] However, in our brief we went further and adopting the holding of the Supreme Court in American case showed that even under the evidence of appellant it did not necessarily follow that the contract was joint.

Under either theory respondent was entitled to a verdict and an affirmance thereof. The instruction complained of by counsel is taken practically word for word from the American L. & L. case, with which counsel is otherwise so favorably impressed. Under such circumstances, it is not clear how there could be reversible error, for a verdict based upon either theory would be correct.

In passing we may say that the rule that the Supreme Court will not reverse the verdict of a jury based upon conflicting evidence is not time worn, as suggested by counsel for appellant, but is rather time honored, and a fundamental basis of our government.

It is submitted that the petition for rehearing should not be granted.

Norris, Hurd, Rhoades & Hallett, Attorneys for Respondent.

Service admitted this 26th day of February, 1923.

I. Parker Veazen, W. L. Clift, and R. H. Glover, Attorneys for Appellant.

[fol. 231] MINUTES OF SUPREME COURT, STATE OF MONTANA. TWENTY-NINTH DAY OF DECEMBER TERM.

Friday, March 2nd, 1923.

Court convened pursuant to recess.

Present: The Hon. Lew. L. Callaway, Chief Justice; the Hon. Charles H. Cooper, Associate Justice; the Hon. Wm. L. Holloway, Associate Justice; the Hon. Albert J. Galen, Associate Justice; the Hon. Albert P. Stark, Associate Justice; Hon. B. B. Law, Commissioner; Hon. Stanley E. Felt, Commissioner; Hon. Lyman H. Bennett, Commissioner; Dana M. Easton, Clerk; M. N. Race, Marshal.

And the following proceeding was had:

[Title omitted]

ORDER DENYING PETITION FOR REHEARING

Motion for re-hearing in this cause is denied.

Lew. L. Callaway, Chief Justice. Attest: Dana M. Easton, Clerk.

[fol. 232] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

WRIT OF CERTIORARI AND RETURN—July 14, 1923

UNITED STATES OF AMERICA,
State of Montana, ss:

Office of the Clerk of the Supreme Court of the State of Montana

In obedience to the Writ of Certiorari from the Supreme Court of the United States to the Supreme Court of the State of Montana, attached hereto, the undersigned, as Clerk of said Supreme Court of the State of Montana, does hereby make the following return thereto, to-wit:

I. There is attached hereto thesaid original Writ of Certorari.

II. That the record and proceedings in the cause referred to in said Writ of Certiorari (entitled in said Supreme Court of the State of Montana, R. L. Cornwell, Respondent vs. James C. Davis, as Agent of the President of the United States under the Transportation Act of 1920, Appellant, Cause No. 5003, on appeal from a judgment of the District Court for Valley County, Montana, rendered on the 12th day of March, 1921) has been lately certified by the undersigned and filed in the office of the Clerk of the Supreme Court of the United States in support of the petition of said Appellant filed in said Supreme Court of the United States, praying for a Writ of Certiorari to the Supreme Court of the State of Montana.

[fol. 233] III. That there is attached hereto a full, true and correct copy of the original Stipulation of counsel for the respective parties to said cause as to how a return shall be made by the undersigned to said Writ and, under the instruction of counsel for the appellant, said stipulation is hereby certified as a return to said Writ.

In witness whereof, the undersigned has hereonto set his hand and affixed the Seal of said Supreme Court of the State of Montana, this 6th day of July, A. D. 1923.

Dana M. Easton, as Clerk of the Supreme Court of the State of Montana. (Seal of the Supreme Court, State of Montana.)

[fol. 234] IN THE SUPREME COURT OF THE STATE OF MONTANA

(Cause No. 5003)

[Title omitted]

STIPULATION FOR RETURN TO WRIT OF CERTIORARI

It is hereby stipulated and agreed by and between the parties to the above entitled cause, appellant and respondent, by and through their respective counsel of record, that the certified copy of the transcript of the rerord filed in the Supreme Court of the United States, with the petition for Writ of Certiorari filed in said Supreme Court of the United States by the above named appellant as petitioner, may be taken as, and shall be the return to the Writ of Certiorari granted by the Supreme Court of the United States to said Supreme Court of the State of Montana, and issued out of and under the Seal of said Supreme Court of the United States on the 23rd day of June, 1923.

Dated this 5th day of July, A. D. 1923.

I. Parker Veazey, Jr., and F. G. Dorety, Attorneys for Appellant. Edwin L. Norris & Geo. E. Hurd, Attorneys for Respondent.

I, Dana M. Easton, Clerk of the Supreme Court of the State of Montana do hereby certify that the foregoing is a full, complete and true copy of an original stipulation filed in this court on the 6th day of July, 1923 in the above entitled cause.

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 6th day of July, 1923.

Dana M. Eaton, Clerk of the Supreme Court, State of Montana. (Seal of the Supreme Court, State of Montana.)

[fol. 235] UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Montana, Greeting:

Being informed that there is now pending before you a suit in which John B. Payne, Director General of Railroads, as Agent, under the Transportation Act of February 28, 1920, (James C. Davis, as Director General and as Agent aforesaid, Successor of and substituted for John B. Payne), is appellant, and R. L. Cornwell is respondent, which suit was removed into the said Supreme Court by virtue of an appeal from the District Court of the Seventeenth Judicial District of the State of Montana in and for the County of Valley, and we, being willing for certain reasons that the said cause

and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the [fol. 236] United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-third day of June, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[fol. 237] [File endorsement omitted.]

[fol. 328] [File endorsement omitted.]

[redacted]

IN THE

Supreme Court of the United States

October Term, 1922.

JAMES C. DAVIS, as Agent of the President of the United States under the Transportation Act of 1920, Petitioner,

VS.

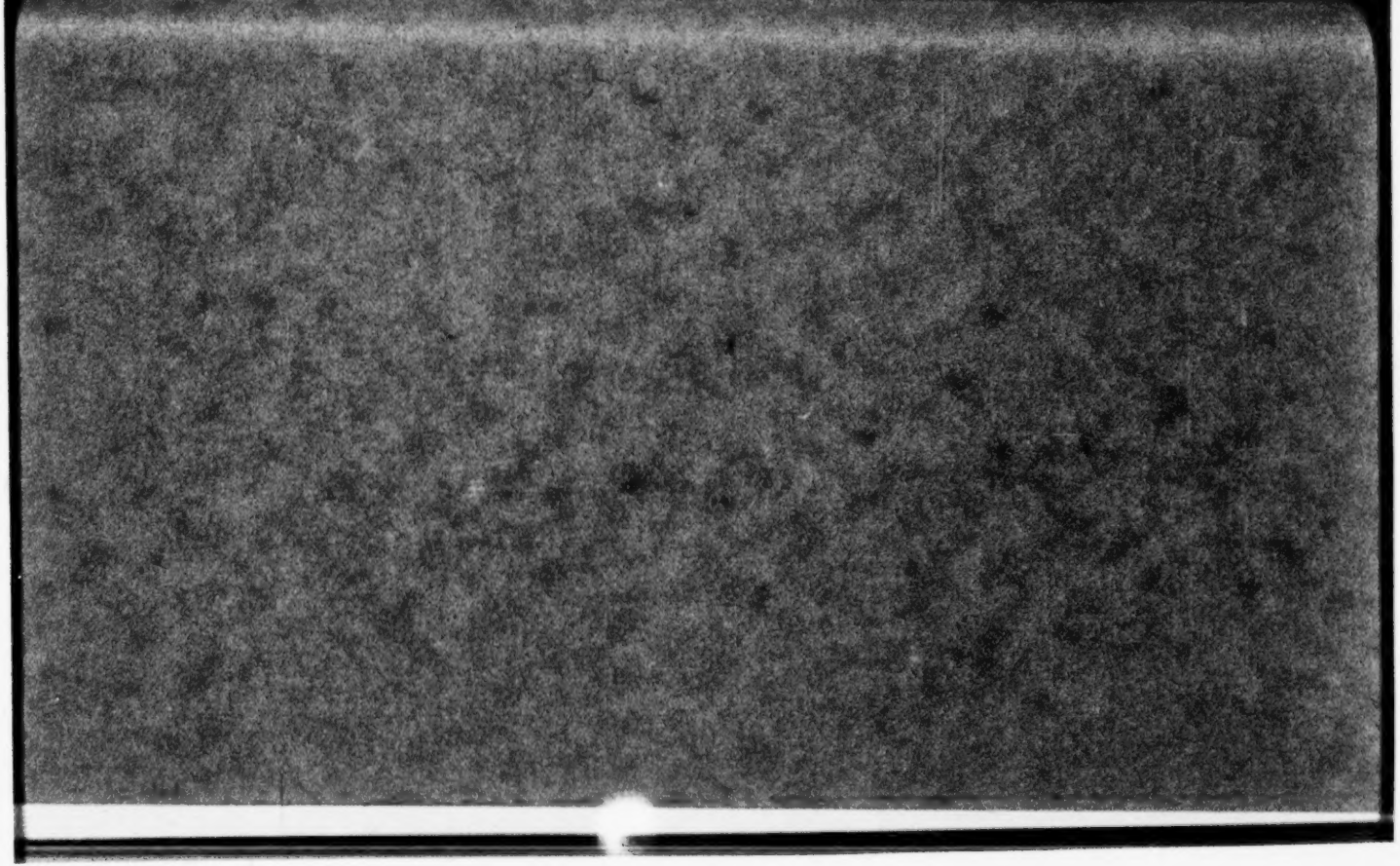
R. L. CORDWELL, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF [redacted] OF MONTANA AND THE BRIEF

NOTICE OF [redacted]

A. A.

[redacted]



IN THE

Supreme Court of the United States

OCTOBER TERM, 1922

JAMES C. DAVIS, as Agent of the President of the United States under the Transportation Act of 1920, Petitioner,

VS.

R. L. CORNWELL, Respondent.

NOTICE OF THE DATE OF SUBMISSION OF PETITION FOR WRIT OF CERTIORARI

To the Respondent in the above entitled action:

AND

To MESSRS. NORRIS, HURD, RHOADS & HALLETT, of Glasgow, Montana, as Attorneys for said Respondent:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE: That, upon the annexed petition of James C. Davis, as Agent of the President of the United States under the Transportation Act of 1920, and a certified copy of the entire transcript of the record of the case in said petition referred to, including the proceedings in the Supreme Court of Montana therein referred to, submitted with said petition, and the petitioner's brief in support of said petition, an application will be made to the Supreme Court of the United States, at a term of said Court to be held at Washington, D. C., on Monday, the 7th day of May, 1923, at the opening of the Court on that day, or as soon thereafter as Counsel can be heard, for a Writ of Certiorari to be directed to the Supreme Court of Montana as in the annexed petition prayed.

I. PARKER VEAZEY, JR.,
Great Falls, Montana,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1922.

JAMES C. DAVIS, as Agent of the President of the United States under the Transportation Act of 1920, Petitioner,

VS.

R. L. CORNWELL, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

JAMES C. DAVIS, as Agent of the President of the United States under the Transportation Act of 1920, the petitioner above named, in support of this your petitioner's petition for a Writ of Certiorari to review a certain judgment rendered by the Supreme Court of the State of Montana, respectfully represents:

1. That the Supreme Court of Montana, in a cause in said Court numbered 5003 and entitled R. L. CORNWELL, respondent, vs. JAMES C. DAVIS, as Agent as aforesaid, appellant, reviewed a judgment of the District Court for Valley County, Montana,

rendered on the 12th day of March, 1921, awarding to the respondent, as plaintiff in said trial Court, compensation for damages claimed to have been sustained to his cattle awaiting cars for an interstate transit from Glasgow, Montana, to Chicago, Illinois, and the said Supreme Court did, on the 10th day of February, 1923, determine said appeal and did render and pass its judgment directing that the said judgment of said trial Court should be affirmed, and defendant denied a new trial. That thereafter your petitioner petitioned for a rehearing of said cause and the same was, on the 2nd day of March, 1923, denied.

2. That said judgment, as rendered and passed by the Supreme Court of said State of Montana, was a final judgment in said suit in the highest Court of the State of Montana in which a decision in said suit could be had and, in said cause, certain rights, priviliges, and immunities were claimed by your petitioner under the constitution and statutes of the United States, and the decision in said cause was against said rights, privileges, and immunities, so especially set up and claimed by your petitioner under the constitution and statutes of the United States, to-wit:

A

CONCLUSIVENESS OF CAR DISTRIBUTION MADE BY THE DIRECTOR GENERAL AS A GOVERNMENTAL OFFICER AS DISTINGUISHED FROM CAR DISTRIBUTION BY THE DIRECTOR GENERAL AS A CARRIER.

In this case the plaintiff in his complaint (Tr. 2 to 11) sued to recover for damages claimed to have been

sustained in the loss of market prices for cattle due to a two weeks delay in October, 1918, by the director general in furnishing cars at Glasgow, Montana, for a shipment to Chicago. The action was based upon an express contract to furnish cars on a given date and also on the ground that the defendant breached a common law duty to furnish cars by the time fixed, the same being alleged to have been a reasonable time within which the cars should have been furnished.

Two questions arose in the case:

(1) Was the director general as a carrier in operating the railroad of the Great Northern Railway Company through the federal manager of that railroad negligent in the local distribution over the Great Northern system of the cars furnished for use on that system. In other words, was the government as a carrier over the Great Northern negligent? This was a proper subject of inquiry and a proper basis of liability.

(2) The second question was whether the director general, exercising governmental functions and not his functions as a carrier, was negligent. It was shown that, under government operation, all railroad cars on the various railroads of the United States were pooled by the government into a common reservoir as a car supply for filling car needs in the best way for the nation. The distribution of these cars was handled by the director general and his regional directors who assigned to the federal manager of each railroad the cars he might distribute over that railroad. In doing this work of regulating car supply, the government or the director general or the regional directors

were not acting as carriers but as government officers discharging governmental functions. Therefore, the DEFENDANT, your petitioner, SUBMITTED THAT ONLY NEGLIGENCE, if any, IN THE DISTRIBUTION OF CARS BY THE FEDERAL MANAGER of some railroad (that is to say negligence BY THE GOVERNMENT AS A CARRIER by that railroad) WAS A PROPER SUBJECT OF INQUIRY, BUT THAT NEGLIGENCE, if any, IN THE DISTRIBUTION OF CARS TO SUCH FEDERAL MANAGER, (that is to say NEGLIGENCE, if any, BY THE GOVERNMENT or by the director general or the regional directors acting NOT AS CARRIERS BUT as governmental officers DISCHARGING GOVERNMENTAL FUNCTIONS), COULD NOT BE THE SUBJECT OF REVIEW BY A COURT OR JURY.

Evidence was introduced (Tr. p. 134 l. 4 to p. 136 l. 13) making it a question of fact, in accordance with the above classification, whether the Government as a carrier over the Great Northern (the federal manager of the Great Northern and his subordinates) was negligent in the distribution of the cars assigned to that railroad; and evidence was also introduced making it a question of fact whether the director general was negligent in not distributing enough cars to the federal manager of that railroad. ACCORDINGLY YOUR PETITIONER, AS DEFENDANT, SOUGHT TO HAVE THIS LATTER ISSUE WITHDRAWN FROM THE CASE AND TO HAVE THE JURY INSTRUCTED THAT THEY COULD NOT FOUND A CAUSE OF ACTION

FOR THE PLAINTIFF ON ANY EVIDENCE OF SUPPOSED NEGLIGENCE OF THE DIRECTOR GENERAL IN NOT DISTRIBUTING ENOUGH CARS TO THE GREAT NORTHERN, BUT A VERDICT FOR PLAINTIFF MUST BE BASED EXCLUSIVELY ON EVIDENCE OF NEGLIGENCE, IF ANY, IN THE DISTRIBUTION OF CARS ALLOTTED TO THE GREAT NORTHERN.

The issue between the parties was presented in the form of the following instruction (Tr. p. 155 l. 23 to p. 156 l. 5) requested by the defendant:

Requested Instruction No. 24:

> "You cannot review any car distribution made by the director general himself or by his representatives determining general questions of distribution over the United States. In the matter of car distribution you can find the director general negligent only if you find that his representatives operating the railway prior to federal operation known as the Great Northern railway were negligent in their distribution of cars which he allotted to them to use."

This instruction was refused and the Supreme Court of the state upholds this refusal.

As under the federal law the government could be sued only as a carrier and as under the federal law it and its officers were immune from suit based on the discharge of governmental functions, the Court, in allowing recovery based on alleged negligence in the discharge of governmental functions, has denied the defendant an immunity from suit based on the Federal law.

THE ONLY PORTIONS OF THE RECORD WHICH NEED BE EXAMINED ARE SMALL

INDEED. This, less than five pages would consist only of a portion of two pages setting out the above instruction (p. 155 l. 23 to p. 156 l. 5); two pages summarizing testimony (p. 134 l. 4 to p. 136 l. 13) and a few lines of the opinion of the State Appellate Court.

The question raised is simple and of first impression. It was important, affecting, as it did, the legality of the entire system of car distribution for the United States, that it should have been decided correctly.

B

VALIDITY OF AN AGENT'S EXPRESS CONTRACT TO FURNISH CARS IN A CAR SHORTAGE AS BEYOND HIS AUTHORITY AND WORKING A DISCRIMINATION.

Coming next to the contrary situation, not of car distribution generally by the director general as a government officer, but of local car distribution by the government as a carrier over the Great Northern railway, the defendant requested an instruction (No. 20, Tr. p. 155 l. 6 to 14) to the effect that a local station agent had no authority to enter into a contract with a shipper to furnish cars out of turn but this instruction was refused and the Court gave its instructions No. 3 and 4 authorizing a recovery on a special contract for cars even though this would work a discrimination and defendant's objection to these instructions on these grounds were overruled (Tr. p. 157 l. 12 to p. 159 l. 8).

Thus the defendant requested an instruction as follows, which was refused (Tr. p. 165 l. 6 to 18):

> "No. 20. A station agent of the director general has no authority to enter into an express contract to furnish cars on a date named by a shipper irrespective of the general service due the public and his express agreement, if any, to furnish the cars on that date is not binding if that date is not a reasonable time."

The instructions given recognized the binding effect of the contract even though there was a car shortage, and this would operate as a discrimination (No. 3, Tr. p. 173 l. 28 to p. 174 l. 23; No. 4, p. 174 l. 24 to p. 175 l. 5). Thus in instruction No. 4 the Court charged the jury (Tr. p. 174 l. 24 to p. 175 l. 5) as follows:

> "No. 4: If you believe from the evidence on this case that the agent of the United States Railroad Administration at Glasgow, Montana, promised and agreed with plaintiff to furnish plaintiff a suitable number of cars for the transportation of plaintiff's cattle commencing on the 2nd day of October, 1918, it was the duty of the United States Railroad Administration so to do and it cannot escape liability on the ground that it did not have a sufficient number of suitable cars available to furnish the same to the plaintiff on said date."

Objections by the defendant (Tr. p. 157 l. 12 to p. 159 l. 8) to this instruction to the effect that this would legalize a discrimination were overruled. Defendant thus raised its right under the federal law to have the jury instructed as to the limits upon the authority of a station agent in this particular, and as to the illegality under the federal law of any contract which would work a discrimination.

By reason of the refusal of this instruction and the giving of said other instructions defendant has been

denied an immunity from suit under such a contract under the federal law making such contracts void as working a discrimination.

This subject of the power of railroad agents and the validity of their alleged special contracts to furnish cars for interestate transportation in times of car shortage is of growing importance. There is a conflict in the authorities on this subject, and the law is confused by ancient decisions not in keeping with the modern law concerning carriers or with the trend of the decisions in C. & A. Ry. Co. v. Kirby, 225 U. S. 155; 32 Sup. Ct. 648, 56 L. Ed. 1033; Pittsburg, etc., R. Co. v. Fink, 40 Sup. Ct. 27; 250 U. S. 577; and IT IS IMPORTANT THAT THIS LAW ON THIS SUBJECT BE CLEARED UP, AS THE QUESTION ARISES EVERY YEAR WITH INCREASING ACUTENESS.

The most recent case is the case of

SAITTA & JONES V. PENN. R. CO.
179 N. Y. S. 471,

where the Court says:

"The plain reading of sections 1 (b), 3, 6 (a) and 6 (g) of the Interstate Commerce Act, 4 Fed. Stat. Ann. 351-421 (U. S. Comp St. Secs. 8563, 8565, 8569), prohibits a common carrier from making any special contract relative to its cars as facilities of interstate shipment that is not specified in tariffs filed with the commission. The defendant has not filed any tariff with the commission that provided for the contract made herein. The following authorities condemn the contract under consideration, and it cannot be the basis of a claim for damages: Chicago & Alton v. Kirby, 225 U. S. 155,32 Sup. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501; Am. Smelting Co. v. Union Pac. (C. C. A.) 256 Fed. 737; Georgia, Fla. & Ala. Ry. Co. v. Blish 241 U. S. 190,

36 Sup. Crt. 541, 60 L. Ed. 948; J. H. Hamline v. Ill. Cent. Ry. (D. C.) 212 Fed. 324; C. R. I. & Pac. Ry. v. Hardwick, 226 U. S. 426, 33 Sup. Ct. 174, 57 L. Ed. 284, 46 L. R. A. (N. S.) 203; South. Ry. Co. v. Reid, 222 U. S. 424, 32 Sup. Crt. 140, 56 L. Ed. 257; Morrisdale Coal Co. v. Penna. Ry. Co., 230 U. S. 304, 33 Sup. Ct. 938, 57 L. Ed. 1494; Southern Ry. Co. V. Prescott, 240 U. S., 632, 36 Sup. Crt. 469, 60 L. Ed. 836."

The importance of the question, in the light of the Federal Statutes and the above decisions, is shown by the following comparisons:

(1) In the Kirby case, supra, for competitive reasons, the carrier contracted to move the shipper's stock in time to make a particular connection so that it would make a particular market. The shipper might have given his shipment to another carrier and reached the market as expected. This contract was held void. In the instant case, there was no competition, but the Court rules that, by a mere private arrangement between one shipper and a railroad agent, in a car shortage, a promise to have cars on hand on a given day can upset all rules for equitable car distribution and give the shipper a preference over others, either in getting the cars or in compensation for not getting them. The only difference between the two cases is that, though both relate to delays, the Kirby case relates to delays after the shipment has moved and the instant case relates to delays before the shipment has moved. In the one case no action is recognized for negligently soliciting the business and the shippers loss is clear. In the present case an action for a failure to give notice of an inability to furnish the cars, if such failure of notice was negligent, would be all that the shipper could ask;

indeed, if pleaded and proved, it is doubtful if such an action would lie. Moreover the shippers damage from such want of notice is extremely limited.

(2) A merchant, ordering goods, is erroneously quoted a rate. The merchant, on receiving the goods, sells them on a narrow margin of profit based on the freight rate which he paid. He cannot, under the Fink case, supra, sue on an express contract for the rate named nor can he sue for a negligent quotation of the rate. The merchants damage and its cause is clear. In the instant case the shipper does not sue for even an alleged negligent failure to give him notice of an inability to furnish cars on a date named, in which the damages caused thereby would be small indeed, but he sues for the breach of contract claiming a loss of market which he claims he had an absolute right to reach, over all other shippers, because of a special contract.

(3) In the two former cases the opportunity for collusion between the shipper and the carrier is sufficient to declare the contracts void. Here, too, there is even a greater opportunity for collusion, for a favored shipper, who, without discrimination, could not reach a market in his regular turn, can insure himself by making an express contract for cars which will compel the carrier to give him the cars or pay him for the loss of market, and this insurance he gets at public expense through the carrier without additional charge and, in a car shortage, as a discrimination against others.

Indeed, to refuse to recognize the validity of such a contract works no hardship at all on the shipper. He does not lose a market because he was not entitled to a market if he could get to it only by an unfair discrimination. He is not necessarily put to additional expenses in holding his cattle, because he would be compelled to hold them anyway awaiting his turn. His only

loss conceivable is perhaps some peculiar, limited, small, additional expense which does not peculiarly arise out of any failure to perform the contract but might, in a given case, arise out of a negligent failure to give him notice of the inability to furnish cars. If his right to a cause of action for a negligent failure to give him notice, if such a case shall arise, is recognized, the shipper is fully protected; if a greater right is recognized and if a contract to furnish cars is recognized, especially in a car shortage, he gets a special service for which no special charge is made in the tariffs and, in addition, in an allowance for a loss of market and other damages, the door is opened for the widest collusive fraud and discrimination between the carrier and the favored shipper which could be so carefully concealed that it could never be proved.

WHEREFORE, Your petitioner prays that this Court require that there be certified to it for review and determination the cause aforesaid and that, to this end, a writ of certiorari issue out of this Court directed to the Supreme Court of the State of Montana, commanding said Court to certify and send to this Court, on a day therein to be designated, a full and complete transcript of the record of its proceedings and that said judgment of said Supreme Court of Montana may be reversed, and that your petitioner may have such other and further relief or remedy in the premises as to the Court may seem appropriate.

I. PARKER VEAZEY, Jr.,
Great Falls, Montana.
Attorney for Petitioner.

A. A. McLAUGHLIN,
Washington, D. C.
Of Counsel.

UNITED STATES OF AMERICA }
STATE OF MONTANA } SS
COUNTY OF CASCADE }

I. Parker Veazey Jr., being first duly sworn on oath, deposes and says: That he is one of the attorneys of record for the petitioner named in the foregoing petition and its attorney of record in personal charge in the trial Court and in the Supreme Court of Montana of the proceedings named in said petition and makes this affidavit for and on his behalf.

That the statements made in said petition are true to the best of affiant's information and belief, based as aforesaid from personally conducting said proceedings and from an examination of the records thereof. That this petition is made and presented in good faith and not for delay.

I. PARKER VEAZEY JR.

Subscribed and sworn to before me this 10th day of April, A. D. 1923.

W. L. CLIFT,
Notary Public in and for the State of Montana, residing at Great Falls, Cascade County, Montana.
My commission expires Nov. 29th, 1924.

(Seal)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1922

JAMES C. DAVIS, as Agent of the President of the United States under the Transportation Act of 1920, Petitioner,

VS.

R. L. CORNWELL, Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

In this brief it will be necessary to set forth first (I) the Evidence in the Case showing the importance of the error urged. This will, for convenience, be presented in condensed form. Next (II) will be presented our Argument on the Merits of the Conclusiveness of the Car Distribution by the Government. This will be divided into a discussion of (a) the principles applicable, (b) the statutes and (c) the decisions. We will then discuss (III) the view of the State Appellate Court. Lastly (b) we will discuss the validity of the contract for cars.

THE EVIDENCE OF CAR DISTRIBUTION BY THE GOVERNMENT.

The evidence showed that a serious car shortage existed all over the United States and, to relieve this shortage, and to handle the situation in the best way, cars previously owned by individual railway companies were not assigned by the government, as the operator, to the owning lines, but were treated by the director general as available for the Railroad Administration to be used on different railways over the United States, as conditions and the extraordinary war conditions of time made proper. Pursuant to this policy the director general divided the United States into various districts, placing over each a regional director, who

should issue governmental instructions to the federal manager of each railroad. Orders were, therefore, issued to the federal manager of the Great Northern railroad by the director general to allow cattle cars, received from the Great Northern at St. Paul, to go through to Chicago instead of turning them back at St. Paul and requiring the connecting carrier to furnish cars for the movement from St. Paul to Chicago. Likewise the director general determined the car distribution for each of these various districts and the regional director, representing the director general in said district, in turn allotted these cars to each carrier in his territory, operated by the government, and, in the case of the Great Northern railroad, the cars allotted for that railroad came under the jurisdiction of the federal manager for that railroad (Tr. p. 134 l. 4 to p. 136 l. 12).

The extent of the congestion and demand for cars may be shown by the fact that the evidence showed that, at the times in question, from September 23rd to October 16th, 1918, the receipts of cattle at Chicago for the months of September and October, 1918, were the largest for any previous month of any previous year on record, with records going back as far as 1865. Moreover, the growth in 1918 was shown. Thus, the receipts at Chicago for October, 1918, were 38.5 per cent. over the receipts for the same month in 1916 and for September, 1918, when the plaintiff's order was said to have been placed, 67.9 per cent over the same month in 1916.

Moreover, the receipts of livestock for the year 1918 exceeded the receipts for any previous year on record and this was true, not only as to Chicago, but also at the seven other principal western terminal livestock markets.

Coming even to the exact time that the plaintiff alleges his special contract was made, the receipts of cattle at Chicago for the week ending September 28th were the largest on record for any previous week of any previous year and the week ending October 12, 1918, was the second largest in the history of the business.

These startling figures as to the pressure upon the railroads at that time, and a summary of the testimony presenting conflicts in evidence which were submitted to the jury are found on pages 134 to 136 of the transcript.

In order to handle this situation, the evidence showed that, instead of putting out governmental orders regulating different carrier corporations and telling these carrier corporations what the government required should be done, the government itself took over the operation of the railroads and itself operated them, ousting the corporations from their properties. The director general was assisted in the discharge of his governmental functions by regional directors, one of whom controlled the car distribution for the Northern Pacific, the Northwestern, the Milwaukee and the Great Northern railroads. The director general allotted cars to the regional director and he, in turn, allotted them to the different railroads, and, on each railroad, they came under the management of the federal manager operating that railroad.

The director general and his regional directors exercised, in the matter of car distribution, governmental functions and the questions of negligence must begin, if at all, with the actions of the federal manager of any railroad who is the first carrier officer encountered.

With this idea in view, the defendant presented requested instruction No. 24 (Tr. p. 155 l. 23 to p. 156 l. 5) to the effect that the jury could not review any car distribution made by the director general, or by his regional representatives, but, in the matter of car distribution, the director general as carrier could be found negligent only if the jury found that his representatives operating the Great Northern railway, were negligent in their distribution of the cars over that system which the director general allotted to said Great Northern representatives or allowed them to use, but this instruction was refused, the Court being of the opinion that the government, as a carrier, was a single

carrier over the United States, not performing any governmental functions but acting only as a carrier, and, hence, subject to having all of its actions reviewed.

II.

ARGUMENTS ON THE MERITS OF CONCLUSIVENESS OF CAR DISTRIBUTION BY THE GOVERNMENT.

A.

As a Matter of Principle.

The government, in operating the railroads, was performing two functions. It was a government regulating carriage and it was also a carrier. If the government had only regulated the corporations, government orders issued to the corporations as carriers would have been binding upon the corporations, and compliance by the carrier with the government's war orders would have been a complete defense. If, therefore, the government, as a war measure, had directed all carrier corporations to pool their cars and to send them where the government directed, a car shortage, caused by a compliance with such a command, would not be the basis of a cause of action and the courts could not require the carrier corporation to defend the action of the government, or to show that the general car distribution effected by the government was reasonable. What difference does it make, then, that, instead of the government issuing directions to the corporation, it operates the railways itself and takes over the car supply and then distributes cars to each government carrier.

A second reason is that the government, as operator of the railways, did not consent to all liability, but only to liability in the performance of the work of a carrier. Here, too, it is a popular notion that the government was a single carrier and, therefore, would be liable for all acts of the railroad administration from the director general at Washington to the humblest employe. This is erroneous, however. The government was not a carrier, but several carriers. The government in operating the Great Northern was a carrier operating the Great Northern; in operating the Northern Pacific and the Milwaukee, it was not still the same carrier, but a second and third carrier. This will be shown in the discussion of the statutes and decisions. Suffice it to say here that its liability, or operations, as carrier, began with its representatives operating a particular railroad. The director general and the regional directors were not carrier officers, but governmental officers. The first carrier officer is found in the federal manager in charge of a particular railroad. As the government was a carrier by the Great Northern, naturally its liability could be considered only from the standpoint of what the federal manager of that railroad and his subordinates did in the matter of distributing cars allotted to him for that system. Neither the court, nor the carrier (represented by the federal manager of the railroad) could dispute the action of the regional directors, or of the director general. As the carrier, via the Great Northern, was bound by the car distribution made to that system, such carrier could not be made liable on any theory that that car distribution was negligent, but only if,

starting with the cars thus distributed to that railroad, the proof should show that the carrier was negligent in handling those cars.

Any other rule would defeat the very purpose of the government in pooling the car supply, for a jury in Montana finds that the government brought cars to Montana territory too late, and a jury in each of the other states finds that the government took cars from the other states for use in Montana too early.

Practically speaking, the recognition of plaintiff's rule would be impossible. It is just barely possible—almost not possible— for a single carrier to explain its own car supply, the demands made upon it, and the distribution it made of those cars. But, if it were necessary, in any case, to cover the entire car situation over the United States on all railroads, what attorney could present the evidence in any logical way, what court could give the time adequately to hear it, what rules of evidence would necessarily have to be abolished in order to establish the facts.

Then, too, what has been accomplished? There might be a hundred such duplicate trials all over the United States, each reaching a different and inadequate decision on complicated facts, affirming or reversing, in effect, an exhaustive hearing held in the first instance by the director general and his trained assistants, unhampered by rules of evidence and deciding from intimate knowledge and experience.

B.

As a Matter of Statute.

These conclusions drawn from principle are confirmed by the Federal Control Law.

Sec. 3115-¾a does not say that the President has taken over all railways and is operating them as a carrier, but says that the President has taken over the possession and operations of "certain systems of transportation" which are "called herein carriers." The government thereafter thus became a "carrier" as to each "system of transportation." The government was called "carriers" not "a carrier."

Sec. 3115-¾j, then provides for the liability of the government in the operation of the railways. It does not provide that the government as carrier shall be liable for all its acts throughout the United States, in any way connected with a railway, but provides that "carriers" (the government) while under federal control shall be subject to all laws and liabilities as common carriers." It provides how actions shall be brought "against such carriers" (the Government).

Sec. 3115-¾l, provides for an accounting by such government carrier of the money collected by it and for the maintenance of separate accounts by the government as a carrier on one railroad and on another.

C.

As a Matter of Decisions.

The decisions support this view and recognize that the government was not a single carrier, but several carriers. The government cannot be served on a Northern Pacific cause of action so-called by serving a Great Northern Agent so-called and the distinction between initial and connecting carriers is maintained under government operation, and employes of the government as a carrier by the Northern Pacific are not

fellow servants of employes of the Government as carrier by the Great Northern.

Harmon vs. Hines, 101 S. E. 925;
Brooks vs. Director General, 263 Fed. 211;
Bostwick vs. Director General, 189 N. W. 907;
Payne vs. Lyon, 114 S. E. 892 at 896;
Farr vs. St. L. S. W. Ry. Co., 243 S. W. 800.

It was not intended that federal operation should give a shipper greater rights than private operation. Under private operation, each carrier, in the matter of car service, was liable only for its own acts and was not liable for complying with Government regulations. So also the government, as a carrier via the Great Northern, would be liable only for the acts of its representatives locally operating the Great Northern system.

On the exact question, the case of

Underwood vs. Hines, 222 S. W. 1037,

is as near in point as any case we can find.

III.

The Views of the State Appellate Court.

We will show that the State Appellate Court apparently misunderstood the federal question as involving a mere question of pleading. We will accordingly (A) outline the views of the State Appellate Court and (B) endeavor to show that the Court was in error in this regard.

A

The State Appellate Court Misunderstood the Federal Question as Involving a Question of Pleading.

The foregoing argument is substantially but a rep-

etition of the brief filed in the State Supreme Court. But though the trial court passed on these questions adversely to the government and though this was presented to the Appellate Court for review, the Appellate Court escaped it by ruling that the pleadings were defective, a matter never before discussed. Thus the Appellate Court, in its opinion, says:

"The answer puts in issue most of the material allegations of the complaint; however, it is admitted that on September 23, 1918, certain cars were ordered for Glasgow for October 2nd and that the cars were not furnished until October 16th. Defendant denies that he agreed to furnish the cars on October 2, or any other specified date and alleges that the cars were furnished within a reasonable time after they were ordered.

"At the time these cars were ordered and for more than a year thereafter the principal railways of this country, including the Great Northern Railway, were under the control of the United States in the exercise of its war powers. The management was lodged in the director general, who acted through regional directors and through local officers and agents. The rolling stock theretofore belonging to the respective lines of railway was pooled and then apportioned among the several lines as the administration adjudged best suited to meet the exigencies of the times. During September and October, 1918, there was an extraordinary demand for equipment and a serious car shortage.

"It is the contention of the defendant that, under these circumstances, the local agent at Glasgow did not have authority to bind the railway administration by his promises to furnish to any one shipper a given number of cars at a designated time and place; that the apportionment of equipment to the different regions and through each region to the different lines within it was a matter of governmental regulation beyond review by the courts; that defendant could not be required to discriminate in favor of one shipper and against another, and that the ultimate

duty which could be imposed upon him was to furnish to plaintiff his fair proportion of the cars available under the distribution made to the Great Northern line, and that liability could be predicated only upon a breach of that duty."

The Court thus attempts to narrow the issue, and finally disposes of it briefly as follows:

"The number of cars available to the Great Northern line was matter peculiarly within the knowledge of the defendant, his agents and subordinate officers in charge of that line, and assuming, without deciding, that defendant could be heard to say that the delay in furnishing the cars was occasioned by the war necessities of the government, that was a matter of defense which was neither pleaded nor proved."

By a petition for a Rehearing the defendant endeavored to show the Court that the issue was not one of pleading, because (aside from the fact that the proof went in without objection from either side, and no question of pleading was raised at that time and, hence, could not be raised later even if there was no pleading at all) it was a matter which did not relate to a defense, but defined the basis of plaintiff's cause of action. We will amplify this by duplicating here portions of the petition for a rehearing.

In response to the defendants urging the error of the Court in refusing this instruction that the jury could not review car distribution made by the governmen to the Great Northern, and that the plaintiff could not found a cause of action on that alleged negligent distribution, the Court replies merely, that the defendant cannot be heard to say that the delay was occasioned "by war necessities of the government", be-

cause this was "a matter of defense which was neither pleaded nor proved."

But there was no issue of war necessities referred to by the Court. The Court should take judicial notice of the fact that railroads were taken possession of by reason of war necessities, but we are not contending directly that this car distribution was a matter of war necessities, but that, as a matter of law, whether because of war necessities or business necessities, or with or without reason, the government did as a matter of law take possession of all cars, and as a governmental function, distributed them to each railroad and then operated each railroad as a carrier. This is a matter of law of which the Court takes judicial notice without pleading, and we contend that the Court cannot review the reasonableness or lack of reasonableness of this law, or of the action of the government as such, under this law. As well might the Court say, in a suit against the corporation, that it would not take judicial notice that the corporation was not liable, and that the corporation could not escape liability during federal control, without pleading and proof that the government took possession of the railroad and that there was a war necessity for the passage of the federal control law. These things are matters of judicial knowledge, requiring no pleading, because they cannot be put in issue.

The proof shows, as stated, that the government, as a government, determined how many cars should be awarded to its representatives in operating the Great Northern as a carrier, and making a question of

fact whether this was a negligent distribution or otherwise, and the proof also shows what was done by the government, in its position as a carrier, in using those cars on the Great Northern. The latter, negligence by the government as a carrier, or the use of the cars allotted to the Great Northern, was a proper basis of inquiry and could properly be the foundation of a cause of action. The former, a distribution of cars, not by the government as a carrier, but by the government as such, was not the subject of judicial inquiry and could not be the basis of a cause of action. The plaintiff on the other hand, meeting the proof as to the number of cars available to the government as a carrier over the Great Northern, inquires as to the number of cars available over the country, and therefore, available to the director general, and seeks to found a cause of action on his alleged negligent failure to give the carrier sufficient cars. To meet this issue *the defendant tenders an instruction, not as a defense to the action, but as defining negligence and the basis of the plaintiff's cause of action,* to the effect *that the jury in determining, not what is a defense, but what is the proper basis for a cause of action may not review the distribution to* the Great Northern, *but* as a matter of law, can review *only the distribution made by the Great Northern. Yet the Court rules that it was not error to refuse this instruction defining what could be a basis of the plaintiff's cause of action because the defendant had not pleaded this as a defense.* Literally the plaintiff claimed that the proof showed, as something on which he wanted to base his cause of action,

negligence on the part of the government in not distributing sufficient cars to the Great Northern, and the objection is now made that, though this was used favorably for the plaintiff as a basis for his cause of action and as a basis for arguing a verdict in his favor, and though it was proper for the plaintiff to argue to the jury that the jury could found a verdict for the plaintiff based solely on this alleged negligent distribution to the Great Northern, nevertheless, the defendant could not urge an error in an instruction given to this effect, or error in a refusal correctly to advise the jury as to the nature of the plaintiff's cause of action, because these contentions, made by the plaintiff as the basis of his cause of action, were not pleaded by the defendant as a defense.

It is manifestly unfair to permit proof to go in without objection as properly involved in the case and to permit a plaintiff on cross examination, without objection, to bring in many facts showing the number of cars over the United States and showing whether or not the government was negligent in the distribution of cars to various regions and thence to various railroads, and then, when the defendant seeks to have the effect of this evidence understood by the jury, to refuse an instruction advising the jury that they cannot base negligence on such a distribution, and thereby deprive the defendant of a legal right of exoneration and give the plaintiff a right to argue before the jury an issue of negligence, which as a matter of law, is denied to the plaintiff. It is manifestly unfair to a defendant to have this proof go in and to have the trial court permit the plaintiff to avail of it as a basis of his cause

of action, and for the appellate court to say that this erroneous use of the proof by the plaintiff, and the Court's refusal to instruct the jury that the plaintiff could not found a cause of action upon it, and the plaintiff's argument to the jury founding a cause of action upon it, do not constitute error, because the defendant did not plead it.

We respectfully submit, therefore, that this matter having been gone into by both parties without objection, no question of pleading could possibly arise and that the *Court has misconceived the true nature of the instruction as one not defining a defense which the Court says should have been pleaded, but as defining the limits of the plaintiff's cause of action, which, of course, would have no place in any pleading by the defendant.* And we again call the Court's attention to its misconception as representing this as a defense, of war necessities to be pleaded as a defense, where, as a matter of fact, this matter arises not as a war necessity or as any necessity to be reviewed by the Court, but it arises solely as a matter of law under the Federal Control Act, as to what facts can be taken into consideration by the plaintiff as a basis for his cause of action.

As the jury may have found in their general verdict that the government as a carrier over the Great Northern, through the acts of the federal manager of that railroad or his agents, was not negligent, but that the government as a government through the director general or regional director, in distributing cars to the northwestern region, and in the northwestern region to the Great Northern, was negligent, the refusal

to give the instruction in question was clearly prej
dicial.

THE CONTRACT TO FURNISH CARS AS DISCRIMINATION.

The defendant contended that, since the days
preferences on a railroad are over, it would be th
duty of a carrier in a time of car shortage to treat a
alike and to furnish cars without an undue preferen
of one shipper over another and, under private oper
tion, even the president of the railroad, much less
station agent of the corporation in times of priva
operation, or of the government under governme
operation, would have no authority to give a shippe
an advantage over others by a special contract to fu
nish cars. Each shipper would have to await his tur
and his just allotment of cars, and a station agent, o
a superintendent of the division, or the president o
federal manager himself, would have no authority t
nullify the law forbidding the granting of preferenc
and to contract with a shipper that the shipper shoul
receive his cars to the disadvantage of other shippe
and as a discrimination against them, or as a speci
service to the shipper without any extra charge.

It will be conceded that, when a car shortage exist
so that there are not enough cars available to meet th
demands made upon the carrier, it would be unlawfu
for the carrier to prefer one shipper over another an
to give one shipper cars out of his turn or greater i
number than he would be entitled to. It is the dut
of the carrier, under these circumstances, to treat a
alike and to apportion the shortage so that a fair dis
tribution is made of the cars available to the carrie
so that, during the season, each patron receives a fai
allotment of cars and so that shippers first in time re

ceive their allotment of cars as first in right. When there is a car shortage, a shipper is not entitled to all the cars he wants simply because his order is filed first; he is only entitled to his fair share of the available cars, in the light of the demands made. The only effect of his being first in time of making a demand is that he is made first in right to have his allotment, and no more, assigned to him.

If, in this situation, all shippers are being treated fairly by a dispatcher or a superintendent, but one shipper attempts to make a private contract with the president of the carrier, or, during federal control, with the federal manager of a railroad, whereby the even distribution, effected by the superintendent or dispatcher, should be defeated, could it be held that this contract was valid? Or, if an even distribution had been ordered by the federal manager, but a shipper secured a private contract from a superintendent or dispatcher, would it then be the duty of the manager to recognize a supposedly legal obligation of the contract which set at naught his careful arrangements for fair treatment to all, or would it not rather be the duty of the manager to direct the division officials to ignore the contract, illegally made in defeating the public duties of the carrier?

If these are limitations on the power of the president of the corporation under private operation, or of superintendents and dispatchers and of federal managers under government operation, how much more clearly does it appear that any station agent, at any of the various stations on the line of a railroad, has no power to enter into a contract for special car serv-

ice, which will work a discrimination, or provide for a single shipper receiving any cars out of his turn, or in a greater number at one time than is just, bearing in mind the duty of the carrier to work no discrimination and to perform its public service of treating all alike.

Government operation suggests another point. The evidence reviewed shows that a serious car shortage existed all over the United States. The taking over of the railroads by the government, as a matter of common knowledge, was partly inspired by a desire to relieve this situation. The government needed passenger cars for its troops, and freight cars for the sudden movement of war material. These increased demands for transportation required the pooling of all cars and the adoption of a means whereby the balance of the cars for private enterprise should be properly distributed. For this purpose, as will be discussed, the government, as such and not as carrier, promulgated certain governmental regulations of the carriers and, for this purpose, the government, as carrier and not as a government, on various railroads, arranged for the even distribution of the cars proportioned to the needs of the community. Can it be contended that either these governmental orders, or these plans as carriers adopted by the government, can be set at naught by a single shipper stepping up to an agent and laughingly exclaiming that the shortage means nothing to him and that the carefully worked out governmental orders, as to car supply and car distribution, and the local systematic arrangements by the government as carrier, have not interfered with him; he has a contract with the agent.

These questions are their own answers. It must be the law that, in times of a car shortage, it being conceded to be the duty of the carrier to treat all alike, a station agent cannot have authority to contract to furnish cars where this would work a discrimination or defeat the carrier in the discharge of its public duties, and, for this reason, it was error in the court to refuse defendant's Requested Instructions on this subject (Specifications IIa and IIb), and to give instructions to the contrary, overruling objections thereto as set forth above (Specifications IIb, c, d and e).

The case of Underwood v. Hines, 222 S. W. 1037, is directly in point.

See also the case of C. & A. Ry. Co. v. Kirby, 225 U. S. 155; 32 S. Ct. 648; 56 L. Ed 1033.

As regards decisions which might seem to be to the contrary, it should be borne in mind that they do not in fact pass upon the question here raised, unless, possibly, by way of dictum, and they were decided prior to the decision of the Supreme Court of the United States above cited, which is controlling as to interstate shipments.

Ancient dictum, even decisions, on the liability of carriers, must yield to the more modern realization of what necessarily follows from the concept of a carrier as engaged in the public service, so that its liabilities and expenses, under modern regulation statutes, to say nothing of the federal control statutes, under which this action was brought, are now appreciated more and more to be public liabilities and public expenses.

Whatever may have been the rule as regards the authority of a station agent of the corporation, clearly

as agent of the government under federal control he would not have the authority to enter into such a contract.

The necessary result of recognizing a right in an agent by express contract to upset the orderly distribution of cars is to work a discrimination. Let us bear in mind that this is not an action for damages claimed by reason of an alleged negligent failure of the agent to advise the plaintiff that the cars would not be on hand. No negligence in this particular was alleged, and the parties did not attempt to prove or disprove such an issue, and the court expressly charged that it was not an issue (p. 178 l. 3 to 13). If this were the cause of action alleged—if the basis of the cause of action was that, though the plaintiff, by reason of the car shortage could not get cars on October 2nd or until October 16th, it was the duty of the agent to advise him to that effect so that he would not bring in his cattle and be to expense in holding them, then the plaintiff could not recover for any falling in the market, because, by supposition, he was not entitled to any market. The measure of damages would be merely the extra expense the shipper had been put to by reason of the failure to give him advice or any other damage caused by such failure.

But this is not the cause of action alleged here. Here the cause of action alleged is that, by reason of an express contract, the plaintiff had a legal right to sell his cattle on a certain day's market and this right existed in him, notice or no notice. If such a contract is valid when entered into, a notice by the agent that the carrier could not comply with it would be imma-

terial and would not prevent the plaintiff from recovering the loss of market whether or not notice was given.

There is no more evil way of working preferences and discriminations, contrary to the federal law, than to recognize such contracts as valid or as within the powers of an agent.

We would cite the following authorities as to the spirit of the federal law prohibiting discrimination in the matter of rates:

Pittsburg C. C. & St. L. Ry. Co. vs. Fink, 40 Sup. Ct. 27; 250 U. S. 577;
L. & N. R. Co. vs. Maxwell, 237 U. S. 94; 35 Sup. Ct. 494, 59 L. Ed. 853;
Tex. & Pac. Ry. Co. vs. Mugg, 202 U. S. 242; 50 L. Ed. 1011, 26 Sup. Ct. 628;
Tex. & Pac. Ry. Co. vs. Leatherwood, 39 Sup. Ct. 517; 250 U. S. 478.

The principles enunciated in these cases are not any less applicable in car service matters. On the contrary, though a hardship is visited on a shipper, who, after being misquoted a rate by an agent, sells his product in reliance on that rate, no hardship at all is visited on the shipper by a rule merely declaring a special contract for cars void in a car shortage.

Perhaps it should be added that, of course the federal Court is not bound (Atl Coast Line Ry. Co. v. Burnette, 36 Supt. Ct. 75, 239 U. S. 199) by the attempted procedural disposition of the first of these Federal questions here presented.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1922

AMES C. DAVIS, as Agent of the President of the United States under the Transportation Act of 1920, Petitioner,

VS.

R. L. CORNWELL, Respondent

BRIEF IN OPPOSITION TO ALLOWANCE OF WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner herein maintains his right to a writ of certiorari to the Supreme Court of Montana upon two grounds, each arising from the refusal of the trial court to give a requested instruction; and the affirmance of the case on appeal by the State Supreme Court.

Ground "A" is based upon the refusal by the trial court to give petitioner's requested instruction No. 24, which was as follows:

> "You cannot review any car distribution made by the director general himself or by his representatives determining general questions of distribution over the United States. In the matter of car distribution you can find the director general negligent only if you find that his representatives operating the railway prior to federal operation known as the Great Northern Railway were negligent in their distribution of cars which he allotted to them to use."

The reason set forth by petitioner for the granting of the writ to review the alleged error in refusing this instruction is as follows:

"As under the federal law the government could be sued only as a carrier and as under the federal law it and its officers were immune from suit based on the discharge of governmental functions, the Court, in allowing recovery based on alleged negligence in the discharge of government functions, has denied the defendant an immunity from suit based on the Federal Law."

Ground "B" is based upon the refusal of the trial court to give petitioner's requested instruction No. 20, which was as follows:

"A station agent of the director general has no authority to enter into an express contract to furnish cars on a date named by a shipper irrespective of the general service due the public and his express agreement, if any, to furnish the cars on that date is not binding if that date is not a reasonable time." (Petition, p. 8.)

And in the giving of Court's instruction No. 4, which was as follows:

"If you believe from the evidence in this case that the agent of the United States Railroad Administration at Glasgow, Montana, promised and agreed with plaintiff to furnish plaintiff a suitable number of cars for the transportation of plaintiff's cattle commencing on the 2nd day of October, 1918, it was the duty of the United States Railroad Administration so to do and it cannot escape liability on the ground that it did not have a sufficient number of suitable cars available to furnish the same to plaintiff on said date."

The reason set forth by petitioner for the granting of the writ to review the alleged error in refusing petitioner's requested instruction No. 20 and in giving instruction No. 4, is as follows:

"By reason of the refusal of this instruction and the giving of said other instruction defendant has been denied an immunity from suit under such a

contract under the federal law making such contracts void as working a discrimination."

Section 237 of the Judicial Code as amended by the act of September 6, 1919, provides:

> "It shall be competent for the Supreme Court, by certiorari or otherwise, to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause * * * where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission or authority."

Before a writ of certiorari will be granted by the Supreme Court "it should appear that some title, right, privilege or immunity under the Constitution or the laws of the United States was specially set up or claimed in the state court, and that the decision of the highest Court of the state, in which such decision could be had, was (for or) against the title, right, privilege or immunity so set up or claimed. And in that regard, certain propositions must be regarded as settled.

That the title, right, privilege or immunity must be specially set up or claimed at the proper time and in the proper way.

The right on which the party relies must have been called to the attention of the court, in some proper way, and the decision of the court must have been (for or) against the right claimed.

Or, at all events, it must appear from the records, by clear and necessary intendment, that the Federal ques-

tion was directly involved so that the state court could not have given judgment without deciding it; that is, a definite issue as to the possession of the right must be distinctly deducible from the record before the state court can be held to have disposed of such Federal question by its decision.

Sayward v. Denny, 158 U. S. 180, 39 L. Ed. 941.

Before this court will assume jurisdiction the following questions must be answered in the affirmative:

1. Does a Federal question exist?

2. Did the State Court base its decision upon the Federal question?

3. Was the Federal immunity specially claimed at the proper time and in the proper manner?

Jones Natl. Bank v. Yates, 240 U. S. 541, 36 Sup. Ct. Rep. 429, 60 L. Ed. 788;
Kansas City Western R. Co. v. McAdow, 240 U. S. 51, 36 Sup. Ct. Rep. 252, 60 L. Ed. 520;
Eastern R. Co. v. Littlefield, 237 U. S. 140, 35 Sup. Ct. Rep. 489, 59 L. Ed. 878;
Hulbert v. Chicago, 202 U. S. 275, 26 Sup. Ct. Rep. 617, 50 L. Ed. 1026;
Howard v. Fleming, 191 U. S. 126, 24 Sup. Ct. Rep. 49, 48 L. Ed. 121;
Baldwin v. Kansas, 129 U. S. 52, 9 Sup. Ct. Rep. 193, 32 L. Ed. 640;
In re Spies 123 U. S. 131, 8 Sup. Ct. Rep. 21, 31 L. Ed. 80;
Brooks v. Missouri, 124 U. S. 394, 8 Sup. Ct. 443, 31 L. Ed. 454;
Morrison v. Watson, 154 U. S. 111, 38 L. Ed. 927, 14 Sup. Ct. 995;
Erie R. Co. v. Purdy, 185 U. S. 148, 46 L. Ed. 847, 22 Sup. Ct. 605;
Layton v. Missouri, 187 U. S. 356, 47 L. Ed. 214, 23 Sup. Ct. 137.

As to Ground "A" set forth in the petition, it appears from the record that no Federal immunity was especially set forth and claimed in the proper manner.

While a request for an instruction upon a construction of a statute of the United States which will lead to a judgment in petitioner's favor properly raises the question,

> St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. Ed. 281,

yet there must be some basis for such requested instruction in the pleadings and the evidence.

> Riley v. Northern Pac. Ry. Co., 36 Mont. 545;
> Bullard v. Smith, 28 Mont. 387;
> First Natl. Bank v. Carroll, 35 Mont. 302;
> Miller's Estate, 37 Mont. 545;
> Yoder v. Reynolds, 28 Mont. 183;
> Lindsay v. Kroeger, 37 Mont. 231;
> Marrow v. Great Northern R. Co., 46 Mont. 593;
> Sullivan v. Metropolitan Life Ins. Co., 35 Mont. 1.

The decisions of the state court as to questions of state practice or procedure or the construction of pleadings are not reviewable by this Court.

> Lee v. Central of Georgia R. Co., 252 U. S. 109, 40 Sup. Ct. 254, 64 L. Ed. 482;
> Louisville etc. R. Co. v. Holloway, 246 U. S. 525, 38 Sup. Ct. 379, 62 L. Ed. 867;
> Nevada-C.-O. R. Co. v. Burrus, 244 U. S. 103, 37 Sup. Ct. 576, 61 L. Ed. 1019;
> Atlantic Coast Line R. Co. v. Mims, 242 U. S. 532, 37 Sup. Ct. 188, 61 L. Ed. 476.

The Federal right, title, privilege, or immunity must be properly set up or claimed in the trial court whenever, under the state practice, the highest state court, in reviewing the judgments of the trial court, refuses to consider questions not therein properly raised.

Mutual Life Ins. Co. v. McGrew, 188 U. S. 291;

Baldwin v. Kansas, 129 U. S. 52, 32 L. Ed. 640, 9 S. Ct. 193;

In re Spies, 123 U. S. 131, 31 L. Ed. 80, 8 S. Ct. 21;

Brooks v. Missouri, 124 U. S. 394, 31 L. Ed. 454, 8 S. Ct. 443;

Morrison v. Watson, 154 U. S. 111, 38 L. Ed. 927, 14 S. Ct. 995;

Erie R. Co. v. Purdy, 185 U. S. 148, 46 L. Ed. 847, 22 S. Ct. 605;

Layton v. Missouri, 187 U. S. 356, 47 L. Ed. 214, 23 S. Ct. 137.

The State Supreme Court in passing upon the contention of petitioner's said:

> "Assuming, without deciding, that the defendant could be heard to say that the delay in furnishing the cars was occasioned by the war necessities of the government, that was a matter of defense which was neither pleaded nor proved."

And this finding of the State Supreme Court has substantial basis. No intimation can be found in the pleadings which would lead either court or counsel to believe that any such question would be raised. Nor is there one bit of testimony to the effect that the shortage of cars was due to any act of the Director General of Railways or his Regional Director. The evidence does disclose that there was an extraordinary demand for cars and that the Director General of Railways through the regional director made allotments of cars to the various carriers. But there is no suggestion in the evidence that the shortage on the Great Northern was caused by a failure to make such allotment, except as hereinafter set forth.

The Director General was not sued in this case as a governmental officer, or in his governmental capacity, but rather as a carrier under the provisions of Section 3115-3/4 j, Compiled Statutes 1916. His negligence, as such carrier, was the sole basis of plaintiff's action. The negligence of the Director General as a governmental officer in allotting cars was not before the jury under either the pleadings or the evidence, although defendant by the instruction offered endeavored to inject it into the record.

Defendant now says that the instruction was not offered as showing a defense to the action, but only as showing the basis of plaintiff's cause of action Yet the entire record, including the pleadings, the evidence, and the instructions, shows that the whole theory of plaintiff's action was that the Director General was liable as a carrier. If, on the contrary, the reason for the failure to furnish cars, was that sufficient cars had not been allotted, that fact should have been pleaded and proved by the defendant, as it alone had knowledge of such facts. This was the theory of the trial court and of the state Supreme Court, and is correct.

Assuming, as did the State Supreme Court, that petitioner's premise is correct, he still fails to see that there is nothing in the record upon which the instruction in question could be based.

Turning to the record itself, we find the following (Tr. pp. 134 and 135):

"And this said extraordinary demand and the orders of said Regional Director regarding car distribution to the railway of said Great Northern Railway Company, made it impossible to furnish

said cars at an earlier date than they were in fact furnished, the testimony of said witnesses not being conclusive, but making said issues questions of fact for the jury."

The above was evidence adduced by defendant's own witnesses, and by defendant's own admission was inconclusive and simply raised a question of fact for the jury. That question was not as petitioner insists, whether the director general was negligent in allotting cars to the Great Northern, but rather, whether as a matter of fact the failure to furnish cars was due to the extraordinary demand made upon the carrier and the allotments made by the Regional Director. The jury found against petitioner on this question of fact, and its finding is conclusive.

Questions of fact which are merely preliminary to, or the possible basis of, a Federal question, are not in themselves Federal.

Bartlett v. Lockwood, 160 U. S. 357, 40 L. Ed. 455, 16 Sup. Ct. 334;
Merced Min. Co. v. Boggs, 3 Wall. 304, 18 L. Ed. 245;
Quimby v. Boyd, 128 U. S. 488, 32 L. Ed. 502, 9 Sup. Ct. 147;
Telluride Power Trans. Co. v. Rio Grande Western R. Co., 175 U. S. 639, 44 L. Ed. 305, 20 Sup. Ct. 245;
Id., 187 U. S. 569, 47 L. Ed. 307, 23 Sup. Ct. 178;
Chemical Natl. Bank v. City Bank, 160 U. S. 646, 40 L. Ed. 568, 16 Sup. Ct. 417.

Petitioner may not proceed upon a theory here different from that urged upon the trial and State Supreme Courts.

Keokuk Bridge Co. v. Illinois, 175 U. S. 626, 20 S. Ct. 205, 44 L. Ed. 299;

Dewey v. Des Moines, 173 U. S. 193, 19 Sup. Ct. 379, 43 L. Ed. 665.

Petitioner does not maintain that by a proper construction of a Federal statute a different result would follow. According to his brief, the instruction was offered not as a defense, but as defining the limits of the cause of action. Yet before it may be said that a defendant has been refused an immunity within the meaning of the statute, petitioner must have insisted that a judgment cannot be rendered against him consistently with the statutes of the United States.

Nutt v. Knut, 200 U. S. 12, 50 L. Ed. 348, 26 Sup. Ct. 216;

Eau Claire Natl. Bank v. Jackman, 204 U. S. 522, 51 L. Ed. 596.

No contention is made that the result would in any event have been different had the instruction in question been given.

Moreover, the Supreme Court of Montana held that granting petitioners contention to be true, yet under the state of the record there was no occasion for the giving of the instruction. Under such circumstances it cannot be said that a Federal question or immunity was decided by the Supreme Court, or was the basis of its decision. Yet, such a condition must appear from the record before this Court will issue the writ.

U. S. Fidelity etc. Co. v. Oklahoma, 250 U. S. 111, 39 S. Ct. 399, 63 L. Ed. 876;

Municipal Securities Corp. v. Kansas City, 246 U. S. 63, 38 S. St. 224, 62 L. Ed 579;

Mellon Co. v. McCafferty, 239 U. S. 134, 36 S. Ct. 94, 60 L. Ed. 181.

Without discussing petitioner's contention upon the merits, it therefore appears that this court will not take jurisdiction by reason of the questions raised under ground "A" of petitioner's petition.

It may not be amiss to say, however, that the two cases cited by petitioner upon this feature of the matter, i. e.,

Underwood v. Hines, (Mo. App.) 222 S. W. 1037;
C. & A. Ry. Co. v. Kirby, 225 U. S. 155, 32 S. Ct. 648, 56 L. Ed. 1033;

are easily distinguishable upon the facts, as the Supreme Court of Montana aptly pointed out.

What has been said herein relative to Subdivision "A" of the petition is largely applicable to the contentions of petitioner under Subdivision "B."

Again, we find that the Supreme Court of the State agreed with petitioner and said:

> "It must be conceded that it was a primary purpose of the Commerce Act to prohibit unjust discrimination among shippers, and if the contract upon which plaintiff relies contemplated unusual service, advantage or preference to him not open upon equal terms to other shippers, it was illegal and beyond the power of the agent at Glasgow to make (Chicago & Alton R. Co. v. Kirby, 225 U. S. 155, Anno. Cas. 1914 A. 501; Wall v. Northern Pac. Ry. Co., 53 Mont. 81, 161 Pac. 518); but there is not anything upon the face of a contract to furnish nine cars at Glasgow on October 2nd to suggest that plaintiff would receive more than his fair proportion of the cars available at the time, or that the service for which he contracted was not open to all others upon equal terms."

The Supreme Court did not, therefore, hold that in any case petitioner was not entitled to raise the ques-

tion of his immunity under the Commerce Act, but simply held that under the facts of the case as shown by the record no discrimination was shown.

As we have heretofore seen, mere questions of fact are not Federal questions.

> Bartlett v. Lockwood, 160 U. S. 357, 40 L. Ed. 455, 16 S. Ct. 334;
> Merced M. Co. v. Boggs, 3 Wall. 304, 18 L. Ed. 245;
> Quimby v. Boyd, 128 U. S. 488, 32 L. Ed. 502, 9 S. Ct. 147.

Much space in petitioner's brief is devoted to the proposition that, because the government was at war, and its needs must first be taken care of, the contract is discriminatory. However, if the contract was not discriminatory under the general provisions of the Commerce Act, government needs would not make it so, nor lessen the power of the agent to contract. Petitioner overlooks the obvious distinction between a discrimination under the Commerce Act and a defense based upon the war necessities of the government.

Further, as the State Supreme Court said, there is nothing on the face of the contract to show a discrimination. In such case the invalidity of the contract is a matter of defense to be pleaded and proved.

> Engemoen v. Chicago, St. P., M. & O. Ry. Co., 210 Fed. 896.

There is nothing in the pleading or proof on petitioner's behalf that suggests that respondent was receiving greater service than others. And, so far as the record shows other shippers were, as a matter of fact, receiving like service. (Tr. pp. 133 & 134).

Petitioner has also overlooked the fact that by court's instruction No. 5, (Tr. p. 175) the jury were

instructed, without objection on the part of petitioner, as follows:

> "It is the duty of a common carrier to furnish stock cars to a shipper of livestock within a reasonable time after the order therefor is placed with said common carrier. If in this case, even though you should find that there was no contract between the United States Railroad Administration and the plaintiff for the furnishing of said cars on the 2nd day of October, 1918, and you should believe from the evidence that said cars were not furnished to the plaintiff within a reasonable time after such order was placed by the plaintiff, if same was so placed, you will then find that the United States Railroad Administration breached its duty to the plaintiff."

The above instruction eliminates all questions relative to the validity of the contract in question and allows recovery even though such contract is void, or even though the jury found no such contract existed in fact or in law. This instruction was the law of the case, and no objection having been made thereto by petitioner, he is bound thereby.

> Daniels v. Granite Bi-Metallic Co., 56 Mont. 284.

Throughout petitioner's brief we find that his entire argument is based upon a non-existent premise. He assumes at all times that his proof shows without controversy and as a matter of law that the failure to deliver cars was due to the necessities of the government. As a matter of fact, his proof shows nothing of the kind. It shows at most an extraordinary demand for stock cars—a demand known only to petitioner when the contract was entered into.

The only questions determined by the jury, the trial

court and the Supreme Court were whether such extraordinary demand due to war necessities and the allotment by the Director General were or were not responsible for the delay (Tr. p. 135, ll. 5-7). They found in the negative, and their finding upon such questions is conclusive.

In any event, even assuming the record to be as petitioner supposes, the contract does not violate the Commerce Act,

Chicago, R. I. & P. Ry. Co. v. Beatty, 42 Okla. 528, 141 Pac. 442;
Oregon R. & N. Ry. Co. v. Dumas, 181 Fed. 781;
Wood v. Chicago, M. & St. P. Ry. Co., 68 Ia. 491, 27 N. W. 473;
Stewart v. Chicago, R. I. & P. Co., 172 Ia. 313, 151 N. W. 485;
Easton v. Dudley, 78 Tex. 236, 14 S. W. 583;

and Governmental control does not change that rule.

Hines v. Dahn, 267 Fed. 105;
Missouri Pac. Ry. Co. v. Oult, 256 U. S. 554;
Dampskibs A. S. v. Hustis, 257 Fed. 862.

The cases of

Underwood v. Hines, (Mo.) 222 S. W. 1037,
C. & A. R. Co. v. Kirby, 225 U. S. 155,

are no more in point upon this phase of the petition than the other.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 297

IN THE

Supreme Court of the United States

JAMES C. DAVIS, as Agent of the President of the United States under the Transportation Act of 1920, Petitioner,

vs.

R. L. CORNWELL, Respondent.

BRIEF OF PETITIONER

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Filed January ....., 1924

..... Clerk

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vs.

R. L. CORNWELL, Respondent.

BRIEF OF PETITIONER

A.

STATEMENT OF THE CASE.

This case is brought to this Court under a Writ of Certiorari (p. 108) to review a judgment of the Supreme Court of the State of Montana (Tr. pp. 87 to 91) affirming a judgment of the District Court for Valley County, Montana (Tr. p. 7), entered upon a verdict of a jury (Tr. p. 6) awarding the plaintiff compensation for damages claimed to have been sustained in the loss of market prices for cattle, due to a two weeks alleged delay in October, 1918, by the Director General, in furnishing cattle cars at Glasgow, Montana, on the Great Northern Railway, for a shipment to Chicago.

The Complaint (Tr. pp. 1 to 5) shows that the action was based upon an express contract to furnish the cars on a given date and also on the ground that the defendant breached a common law duty to furnish

cars by the time fixed, the same being alleged to have been a reasonable time within which the cars should have been furnished.

Questions to Be Argued.

Of the various questions which arose on the appeal to the State Supreme Court (Tr. p. 85), whose decision (Tr. pp. 87-91) was adverse to the defendant, two remain to be determined in the present proceeding:

The first is (1) the conclusiveness of a car distribution made by the Director General as a Governmental Officer as distinguished from car distribution made by him as a Carrier.

The second is (2) the validity of a railway agent's alleged express contract to furnish cars in a car shortage as beyond his authority and working a discrimination.

These two questions are absolutely distinct. They will be separately presented by showing, as to each, in this statement of the case, how they arose and, in the brief of the argument, there will be separately presented a discussion of the law involved in these two questions.

I.

CONCLUSIVENESS OF CAR DISTRIBUTION MADE BY THE DIRECTOR GENERAL AS A GOVERNMENTAL OFFICER AS DISTINGUISHED FROM CAR DISTRIBUTION BY HIM AS A CARRIER.

On this matter of the car distribution made by the Director General, two bases of liability arose in the trial of the case. They were the following:

First: (1) Was the Director General, as a carrier in operating the railroad of the Great Northern Railway Company, through the Federal Manager of that railroad, negligent in the local distribution over the Great Northern system of the cars furnished for use on that system. In other words, was the Government as a carrier over the Great Northern negligent? This was a proper subject of inquiry and a proper basis of liability.

The second (2) question was whether the Director General, exercising Governmental functions and not his functions as a carrier, was negligent. It was shown (pp. 60-61, fol. 134 to 136) that, under Government operation, all railroad cars on the various railroads of the United States were pooled by the Government into a common reservoir as a car supply for filling car needs in the best way for the nation. The distribution of these cars was handled by the Director General and his regional directors who assigned to the Federal manager of each railroad the cars he might distribute over that railroad. In doing this work of regulating car supply, the Government or the Director General or the regional directors were not acting as carriers but as Government officers discharging Governmental functions. Therefore, the DEFENDANT, your petitioner, SUBMITTED THAT ONLY NEGLIGENCE, if any, IN THE DISTRIBUTION OF CARS BY THE FEDERAL MANAGER of some railroad (that is to say negligence BY THE GOVERNMENT AS A CARRIER by that railroad) WAS A PROPER SUBJECT OF INQUIRY, BUT THAT NEGLIGENCE, if any, IN THE DISTRIBUTION

OF CARS TO SUCH FEDERAL MANAGER (that is to say NEGLIGENCE, if any, BY THE GOVERNMENT or by the Director General or the regional directors acting NOT AS CARRIERS BUT as Governmental officers DISCHARGING GOVERNMENTAL FUNCTIONS) COULD NOT BE THE SUBJECT OF REVIEW BY A COURT OR JURY.

(a)

The Evidence on the Car Shortage.

(p. 60 to 61; fol. 134 to 136.)

The evidence showed that a serious car shortage existed all over the United States and, to relieve this shortage, and to handle the situation in the best way, cars previously owned by individual railway companies were not assigned by the Government, as the operator, to the owning lines, but were treated by the Director General as available for the Railroad Administration to be used on different railways over the United States, as conditions and the extraordinary exigencies of the time made proper. Pursuant to this policy the Director General divided the United States into various districts, placing over each a regional director, who should issue governmental instructions to the Federal manager of each railroad. Orders were, therefore, issued to the Federal manager of the Great Northern railroad by the Director General to allow cattle cars, received from the west over the Great Northern at St. Paul, to go through to Chicago instead of their being turned back at St. Paul and the connecting carrier being required to furnish cars for the movement from St. Paul to Chicago. Likewise the Director General determined the car distribution for each of these various districts, and the regional director, representing the Director Gen[illegible] in said district, in turn allotted these cars to [illegible]rrier in his territory, operated by the Governmen[illegible]. in the case of the Great Northen railroad, the cars allotted for

that railroad came under the jurisdiction of the Federal manager for that railroad (Tr. fol. 134).

The extent of the congestion and demand for cars may be shown by the fact that the evidence showed that, at the times in question, from September 23rd to October 16th, 1918, the receipts of cattle at Chicago for the months of September and October, 1918, were the largest for any previous month of any previous year on record, with records going back as far as 1865. Moreover, the growth in 1918 was shown. Thus, the receipts at Chicago for October, 1918, were 38.5 per cent over the receipts for the same month in 1916 and for September, 1918, when the plaintiff's order was said to have been placed, 67.9 per cent over the same month in 1916.

Moreover, the receipts of livestock for the year 1918 exceeded the receipts for any previous year on record and this was true, not only as to Chicago, but also at the seven other principal western terminal livestock markets.

Coming even to the exact time that the plaintiff alleges his special contract was made, the receipts of cattle at Chicago for the week ending September 28th were the largest on record for any previous week of any previous year and the week ending October 12, 1918, was the second largest in the history of the business.

These startling figures as to the pressure upon the Government in its operation of the railroads at that time, and a summary of the testimony presenting conflicts in evidence which were submitted to the jury are found in the transcript (p. 60, fol. 134, l. 18, to p. 61, fol. 136, l. 26).

The Director General and his regional directors exercised, in the matter of car distribution, governmental functions and the questions of negligence must begin, if at all, with the actions of the Federal man-

ager of any railroad who is the first carrier officer encountered.

(b)

How the Issue of Law Arose.

Evidence was introduced (Tr. pp. 60 to 61) making it a question of fact, in accordance with the above classification whether the Government as a carrier over the Great Northern (the Federal manager of the Great Northern and his subordinates) was negligent in the distribution of the cars assigned to that railroad; and evidence was also introduced making it a question of fact whether the Director General was negligent in not distributing enough cars to the Federal Manager of that railroad. ACCORDINGLY YOUR PETITIONER, AS DEFENDANT, SOUGHT TO HAVE THIS LATTER ISSUE WITHDRAWN FROM THE CASE AND REQUESTED THAT THE JURY BE INSTRUCTED (Tr. p. 71, ll. 12 to 21) THAT THEY COULD NOT FOUND A CAUSE OF ACTION FOR THE PLAINTIFF ON ANY EVIDENCE OF SUPPOSED NEGLIGENCE OF THE DIRECTOR GENERAL IN NOT DISTRIBUTING ENOUGH CARS TO THE GREAT NORTHERN, BUT A VERDICT FOR PLAINTIFF MUST BE BASED EXCLUSIVELY ON EVIDENCE OF NEGLIGENCE, IF ANY, IN THE DISTRIBUTION OF CARS ALLOTTED TO THE GREAT NORTHERN.

This issue of law between the parties was presented in the form of an instruction (Requested Instruction

No. 24) requested by the defendant to the effect that the jury could not review any car distribution made by the Director General, or by his regional representatives, but, in the matter of car distribution, the Director General as carrier could be found negligent only if the jury found that his representatives operating the Great Northern railway, were negligent in their distribution of the cars over that system which the Director General allotted to said Great Northern representatives or allowed them to use, but this instruction was refused, the Court being of the opinion that the Government, as a carrier, was a single carrier over the United States, not performing any governmental functions but acting only as a carrier, and, hence, subject to having all of its actions reviewed.

This requested instruction (which is set forth in Specification I in this brief) was refused, and the Supreme Court of the state upholds this refusal.

As under the Federal law the Government could be sued only as a carrier and as under the Federal law it and its officers were immune from suit based on the discharge of governmental functions, the Court, in allowing recovery based on alleged negligence in the discharge of governmental functions, has denied the defendant an immunity from suit based on the Federal law.

The only portion of the record which need be examined is small indeed. This, less than five pages, consists only of a portion of two pages setting out the above instruction (Tr. p. 71, ll. 12 to 21); two pages summarizing testimony (Tr. p. 60, l. 18, to p. 61, l. 26), and a few lines of the opinion of the State Appel-

late Court (p. 87, l. 1, to p. 88, l. 11; p. 89, ll. 40 to 47).

II.

VALIDITY OF AN AGENT'S ALLEGED EXPRESS CONTRACT TO FURNISH CARS IN A CAR SHORTAGE AS BEYOND HIS AUTHORITY AND WORKING A DISCRIMINATION.

Coming next to the contrary situation, not of car distribution generally by the Director General as a Government officer, but of local car distribution by the Government in a car shortage as a carrier over the Great Northern railway, the defendant requested an instruction (Defendant's Requested Instruction No. 20; Tr. p. 70, l. 45, to p. 71, l. 5, Specification II A) to the effect that a local station agent had no authority to enter into a contract with a shipper to furnish cars out of turn, but this instruction was refused and the Court gave its instructions No. 3 and 4 (Tr. p. 79; Specifications II B and II D) authorizing a recovery on a special contract for cars even though this would work a discrimination and defendant's objections to these instructions on these grounds were overruled. (Tr. p. 72; Specifications II C and II E.)

These instructions given and refused, and the objections made and overruled, are set out verbatim in this brief under the above numbered specifications.

Defendant thus raised its right under the Federal law to have the jury instructed as to the limits upon the authority of a station agent in this particular, and as to the illegality under the Federal law of any contract which would work a discrimination. By reason

of the refusal of this instruction and the giving of said other instructions defendant has been denied an immunity from suit under such a contract under the Federal law making such contracts void as working a discrimination.

B.

SPECIFICATION OF ERRORS.

I A

It was error to refuse to give Defendant's requested instruction No. 24, reading as follows (Tr. p. 71, ll. 12 to 21):

"No 24: You cannot review any car distribution made by the Director General himself or by his representatives determining general questions of distribution over the United States. In the matter of car distribution you can find the Director General negligent only if you find that his representatives operating the railway prior to Federal operation known as the Great Northern Railway were negligent in their distribution of cars which he allotted to them or allowed them to use."

II A

It was error to refuse to give Defendant's requested instruction No. 20, as follows (Tr. p. 70, l. 45, to p. 71, l. 5):

"No. 20: A Station Agent of the Director General has no authority to enter into an express contract to furnish cars on a date named by a shipper irrespective of the general service due the public, and his express agreement, if any, to furnish the cars on that date is not binding if that date is not a reasonable time."

II B

It was error to give the Court's instruction No. 3 (the same being also Plaintiff's requested instruction

No. 3), as follows (Tr. p. 79, l. 4 to l. 21; p. 72, ll. 3 to 20):

"To entitle the plaintiff to recover in this action, it is necessary for him to prove by preponderance of the evidence that he was the owner and in the possession of the cattle, or some of them, mentioned in his amended complaint, on or about the 23rd day of September, 1918; that the agent of the United States Railroad Administration promised to furnish the cars and motive power which it is admitted plaintiff ordered, or that the period between the 23rd day of September, 1918, and the second day of October, 1918, was a reasonable time within which the United States Railroad Administration should furnish said cars and motive power; and that plaintiff has been damaged in one or more of the respects set forth in his amended complaint, and if plaintiff has proven such facts by preponderance of the evidence your verdict should be in his favor in such sum as under these instructions and the evidence you determine he is entitled to recover, but not in any event in excess of $2995.00 and interest at the rate of eight per cent per annum from the date of the commencement of this action, to-wit, August 6th, 1920. Interest, however, is solely in the discretion of the jury."

II C

It was error to overrule defendant's objection to the Court's instruction, the same being also Plaintiff's requested instruction No. 3 (set forth in Specification II B), as follows (Tr. p. 72, ll. 3 to 20):

"The defendant objects to the plaintiff's instruction No. 3 on the ground that it makes the defendant liable for the agent's promise or agreement to furnish cars, even though there was no consideration for such promise, and even though the plaintiff did not expressly or impliedly contract to load the cars, in that the instruction states to the jury:—that the plaintiff is entitled to recover if he proved

the order by him and that the agent promised to furnish the cars, even though the time fixed was not a reasonable time.

"Defendant further objects on the ground that it makes the defendant liable for the alleged promise of the agent, even though the defendant could not in the discharge of its duties ever have furnished the cars, and makes the defendant liable for the promise of the agent, even though the promise of the agent would constitute a discrimination by the agent."

II D

It was error to give the Court's instruction No. 4 (the same being also Plaintiff's requested Instruction No. 4) as follows (Tr. p. 79, ll. 22 to 30; p. 72, ll. 24 to 36):

"No. 4: If you believe from the evidence in this case that the agent of the United States Railroad Administration at Glasgow, Montana, promised and agreed with plaintiff to furnish plaintiff a suitable number of cars for the transportation of plaintiff's cattle commencing on the 2nd day of October, 1918, it was the duty of the United States Railroad Administration so to do and it cannot escape liability on the ground that it did not have a sufficient number of suitable cars available to furnish the same to the plaintiff on said date."

II E

It was error to overrule defendant's objection to the Court's instruction No. 4, the same being also Plaintiff's requested instruction No. 4 (set forth in Specification No. II D) as follows (Tr. p. 72, ll. 24 to 36):

"Defendant objects to Plaintiff's proposed instruction No. 4 on the ground that it makes the defendant liable upon a mere promise or agreement of the agent, even if there was no consideration for such promise; in other words, if the agent promised to have cars and the plaintiff did not expressly, or

impliedly, promise to load the cars, the defendant would be liable, whereas; the defendant cannot be liable for the promise of the agent unless there is consideration therefor, and the defendant further objects to the instruction on the grounds stated to instruction No. 3."

C.

BRIEF OF ARGUMENT.

In this brief of the arguments on the law will be presented first (1) the argument on the conclusiveness of the car distribution by the Government. This will be divided into a discussion of (a) the principles applicable, (b) the Statutes, and (c) the decisions, and then (d) the view of the State Supreme Court will be analyzed. The second (2) subdivision of the argument will relate to the validity of the agent's alleged express contract to furnish cars.

I.

THE CONCLUSIVENESS OF THE CAR DISTRIBUTION BY THE GOVERNMENT.

The question here raised is simple and of first impression.

(a)

As a Matter of Principle.

The Government, in operating the railroads, was performing two functions. It was a Government regulating carriage and it was also a carrier. If the Government had only regulated the corporations, Government orders issued to the corporations as carriers would have been binding upon the corporations, and compliance by the carriers with the Government's war

orders would have been a complete defense. If, therefore, the Government, as a war measure, had directed all carrier corporations to pool their cars and to send them where the Government directed, an inability to fill a car order caused by a compliance with such a command, could not be the basis of a cause of action, and the courts could not require the carrier corporation to defend the action of the Government, or to show that the general car distribution effected by the Government was reasonable. What difference does it make, then, that, instead of the Government issuing directions to the corporation, it operates the railways itself and takes over the car supply and then distributes cars to each Government carrier?

A second reason is that the Government, as operator of the railways, did not consent to all liability, but only to liability in the performance of the work of a carrier. Here, too, it is a popular notion that the Government was a single carrier and, therefore, would be liable for all acts of the railroad administration from the Director General at Washington to the humblest employee. This is erroneous, however. The Government was not a carrier, but several carriers. The Government in operating the Great Northern was a carrier operating the Great Northern; in operating the Northern Pacific and the Milwaukee, it was not still the same carrier, but a second and third carrier. This will be shown in the discussion of the statutes and the decisions. Suffice it to say here that its liability, or operations, as carrier, began with its representatives operating a particular railroad. The Director General and the regional directors were not carrier

officers, but governmental officers. The first carrier officer is found in the Federal manager in charge of a particular railroad. As the Government was a carrier by the Great Northern, naturally its liability could be considered only from the standpoint of what the Federal manager of that railroad and his subordinates did in the matter of distributing cars allotted to him for that system. Neither the Court, nor the carrier (represented by the Federal manager of that railroad) could dispute the action of the regional directors, or of the Director General. As the carrier, via the Great Northern, was bound by the car distribution made to that system, such carrier could not be made liable on any theory that the car distribution was negligent, but only if, starting with the cars thus distributed to that railroad, the proof should show that the carrier was negligent in handling those cars.

Any other rule would defeat the very purpose of the Government in pooling the car supply, for a jury in Montana finds that the Government brought cars to Montana loading points too late, and a jury in each of the other states finds that the Government took cars from loading points in the other states for use in Montana too early.

Practically speaking, the recognition of plaintiff's rule would be impossible. It is just barely possible—almost not possible—for a single carrier to explain its own car supply, the demands made upon it, and the distribution it made of those cars. But, if it were necessary, in any case, to cover the entire car situation over the United States on all railroads, what attorney could present the evidence in any logical way,

what court could give the time adequately to hear it, what rules of evidence would necessarily have to be abolished in order to establish the facts?

Then, too, what has been accomplished? There might be a hundred such duplicate trials all over the United States, each reaching a different and inadequate decision on complicated facts, affirming or reversing, in effect, an exhaustive hearing held in the first instance by the Director General and his trained assistants, unhampered by rules of evidence necessarily inadequate for such an inquiry, and deciding from intimate knowledge and experience.

(b)

As a Matter of Statute.

These conclusions drawn from principle are confirmed by the Federal Control Law.

Sec. 3115-3/4 does not say that the President has taken over all railways and is operating them as a carrier, but says that the President has taken over the possession and operation of "certain systems of transportation" which are "called herein carriers." The Government thereafter thus became a "carrier" as to each "system of transportation." The Government was called "carriers" not "a carrier."

Sec. 3115-3/4j, then provides for the liability of the Government in the operation of the railways. It does not provide that the Government as carrier shall be liable for all its acts throughout the United States, in any way connected with a railway, but provides that "carriers" (the Government) while under Federal control shall be subject "to all laws and liabilities as com-

mon carriers." It provides how actions shall b brought "against such carriers" (the Government).

Missouri Pac. Ry. Co. vs. Ault, 256 U. S 554; 65 L. Ed. 1087; 41 Sup. Ct. R. 593.

Sec. 3115-3/41 provides for an accounting by suc Government carrier of the money collected by it and fo the maintenance of separate accounts by the Govern ment as carrier on one railroad and on another.

(c)

As a Matter of Decisions.

The decisions support this view and recognize tha the Government was not a single carrier, but severa carriers. The Government cannot be served on Northern Pacific cause of action so-called by servin a Great Northern Agent so-called and the distinctio between initial and connecting carriers is maintaine under Government operation, and employees of th Government as a carrier by the Northern Pacific ar not fellow servants of employees of the Governmer as carrier by the Great Northern.

Harmon vs. Hines, 101 S. E. 925;
Brooks vs. Director General, 263 Fed. 21
Bostwick vs. Director General, 189 N. W 907;
Payne vs. Lyon, 114 S. E. 892 at 896;
Farr vs. St. L. S. W. Ry. Co., 243 S. W. 80
Grandquist vs. Duluth M. & N. Ry. Co., 19 N. W. 126;
Davis vs. Daritzler Lbr. Co., 43 Sup. Ct. F 349; 67 L. Ed. ....., U. S. .....;
St. L. B. & M. Ry. Co. vs. McLean, 253 S W. 248.

It was not intended that Federal operation shoul

give a shipper greater rights than private operation. Under private operation, each carrier, in the matter of car service, was liable only for its own acts and was not liable for complying with Government regulations. So also the Government, as a carrier via the Great Northern, would be liable only for the acts of its representatives locally operating the Great Northern system.

On the exact question, the case of Underwood vs. Hines, 222 S. W. 1037, is as near in point as any case we can find.

(d)

The Views of the State Appellate Court.

We will show that the State Appellate Court apparently misunderstood the Federal question as involving a mere question of pleading. We will accordingly outline the views of the State Appellate Court and endeavor to show that the Court was in error in this regard.

(1)

The State Appellate Court Misunderstood the Federal Question as Involving a Question of Pleading.

Though the trial court passed on these questions adversely to the Government, and though this was presented to the Appellate Court for review, the Appellate Court sought to escape them by ruling that the pleadings were defective, a matter never before discussed. Thus the Appellate Court, in its opinion, says (Tr. p. 87, l. 32, to p. 88, l. 24; p. 89, ll. 40 to 47):

"The answer puts in issue most of the material

allegations of the complaint; however, it is admitted that on September 23, 1918, certain cars were ordered for Glasgow for October 2nd and that the cars were not furnished until October 16th. Defendant denies that he agreed to furnish the cars on October 2, or any other specified date and alleges that the cars were furnished within a reasonable time after they were ordered.

"At the time these cars were ordered and for more than a year thereafter the principal railways of this country, including the Great Northern Railway, were under the control of the United States in the exercise of its war powers. The management was lodged in the Director General, who acted through regional directors and through local officers and agents. The rolling stock theretofore belonging to the respective lines of railway was pooled and then apportioned among the several lines as the administration adjudged best suited to meet the exigencies of the times. During September and October, 1918, there was an extraordinary demand for equipment and a serious car shortage.

"It is the contention of the defendant that, under these circumstances, the local agent at Glasgow did not have authority to bind the railway administration by his promises to furnish to any one shipper a given number of cars at a designated time and place; that the apportionment of equipment to the different regions and through each region to the different lines within it was a matter of governmental regulation beyond review by the courts; that defendant could not be required to discriminate in favor of one shipper and against another, and that the ultimate duty which could be imposed upon him was to furnish to plaintiff his fair proportion of the cars available under the distribution made to the Great Northern line, and that liability could be predicated only upon a breach of that duty."

After having thus reviewed the evidence and the conflicting claims actually litigated in the trial Court,

the Appellate Court briefly disposed of the question as follows (Tr. p. 89, ll. 40 to 47):

> "The number of cars available to the Great Northern line was matter peculiarly within the knowledge of the defendant, his agents and subordinate officers in charge of that line, and assuming, without deciding, that defendant could be heard to say that the delay in furnishing the cars was occasioned by the war necessities of the Government, that was a matter of defense which was neither pleaded nor proved."

(2)

A Question of Pleadings Could Not Arise.

By a petition for a rehearing the defendant endeavored to show the Court that the new issue raised by the Appellate Court as to the sufficiency of the pleadings could not arise as, aside from the actual sufficiency of the pleadings, the evidence had been introduced without objection as relevant in the opinion of both parties, and the only question of law was not one of relevancy under pleadings, but of the legal effect of evidence actually introduced. The Supreme Court's decision itself fully outlines the fact of the car shortage and the issues actually litigated. As these issues were actually litigated (pleadings, insufficient pleadings, or no pleadings at all) under an unbroken line of Montana decisions, in harmony with universal law, it was too late to attempt any disposal of the matter as a question of pleading.

Lackman vs. Simpson, 129 Pac. 325, 46 Mont. 518, at 525;

State, ex. rel. Dansie vs. Nolan, 191 Pac. 150, 58 Mont. 167, at 171;

Ellinghouse vs. Ajax Livestock Co., 152 Pac. 481, 51 Mont. 275, at 282;
Moss vs. Goodhart, 131 Pac. 1071, 47 Mont. 257, at 267;
O'Brien vs. Corra Rock Island Mng. Co., 105 Pac. 724, 40 Mont. 212, at 222.

(3)

No Question of Pleadings Did Arise.

Moreover, the issue, in fact, was not an issue as to what should be pleaded as a defense, but a question as to what evidence could be the basis of plaintiff's alleged cause of action.

In response to the defendant's urging the error of the Court in refusing this instruction that the jury could not review car distribution made by the Government to the Great Northern, and that the plaintiff could not found a cause of action on that alleged negligent distribution, the Court replies merely, that the defendant cannot be heard to say that the delay was occasioned "by war necessities of the Government," because this was "a matter of defense which was neither pleaded nor proved."

But there was no issue of war necessities, referred to by the Court. The Court should take judicial notice of the fact that railroads were taken possession of by reason of war necessities, but we are not contending directly that this car distribution was a matter of war necessities, but that, as a matter of law, *whether because of war necessities or business necessities, or with or without reason, the Government did* as a matter of law *take possession of all cars,* and, as a govern-

mental function, distributed them to each railroad and then operated each railroad as a carrier. This is a matter of law of which the Court takes judicial notice without pleading, and we contend that the Court cannot review the reasonableness or lack of reasonableness of this law, or of the action of the Government as such, under this law. As well might the Court say, in a suit against the corporation, that it would not take judicial notice that the corporation was not liable, and that the corporation could not escape liability during Federal control, without pleading and proof that the Government took possession of the railroad and that there was a war necessity for the passage of the Federal Control Law. These things are matters of judicial knowledge, requiring no pleading, because they cannot be put in issue.

The proof shows, as stated, that the Government, as a Government, determined how many cars should be awarded to its representatives in operating the Great Northern as a carrier, and making a question of fact whether this was a negligent distribution or otherwise, and the proof also shows what was done by the Government, in its position as a carrier, in using those cars on the Great Northern. The latter, negligence by the Government as a carrier, or the use of the cars allotted to the Great Northern, was a proper basis of inquiry and could properly be the foundation of a cause of action. The former, a distribution of cars, not by the Government as a carrier, but by the Government as such, was not the subject of judicial inquiry and could not be the basis of a cause of action. The plaintiff on the other hand, meeting the proof as

to the number of cars available to the Government as a carrier over the Great Northern, stresses the number of cars available over the country, and therefore, available to the Director General, and seeks to found a cause of action on his alleged negligent failure to give the carrier sufficient cars. To meet this issue *the defendant tenders an instruction, not as a defense to the action, but as defining negligence and the basis of the plaintiff's cause of action, to the effect that the jury in determining, not what is a defense, but what is the proper basis for a cause of action may not review the distribution to the Great Northern, but as a matter of law, can review only the distribution made by the Great Northern. Yet the Court rules that it was not error to refuse this instruction, defining what could be a basis of the plaintiff's cause of action, because the defendant had not pleaded this as a defense.* Literally the plaintiff, as something on which he wanted to base his cause of action, stressed negligence on the part of the Government in not distributing sufficient cars to the Great Northern, and the objection is now made that, though this can be used in the trial Court favorably for a plaintiff as a basis for his cause of action and as a basis for arguing a verdict in his favor, and though the jury may have found a verdict for the plaintiff based solely on this alleged negligent distribution to the Great Northern, nevertheless, the defendant could not urge an error in an instruction given to this effect, or error in a refusal correctly to advise the jury as to the nature of the plaintiff's cause of action, *because these contentions, made by the plaintiff as the basis of his*

cause of action, were not pleaded by the defendant as a defense.

It is manifestly unfair to permit proof to go in without objection and, on its being used to show the number of cars over the United States and whether or not the Government was negligent in the distribution of cars to various regions and thence to various railroads, then, when the defendant seeks to have the effect of this evidence understood by the jury, to refuse an instruction advising the jury that they cannot base negligence on such a distribution, and thereby deprive the defendant of a legal right of exoneration and give the plaintiff a right to argue before the jury an issue of negligence, which as a matter of law, is denied to the plaintiff. It is manifestly unfair to a defendant to have this proof go in and to have the trial court permit the plaintiff to avail of it as a basis of his cause of action, and for the Appellate Court to say that this erroneous use of the proof by the plaintiff, and the Court's refusal to instruct the jury that the plaintiff could not found a cause of action upon it, do not constitute error, because the defendant did not plead it.

We respectfully submit, therefore, that this matter having been gone into by both parties without objection, no question of pleading could possibly arise and that *the Appellate Court has misconceived the true nature of the instruction as one not defining a defense which the Court says should have been pleaded, but as defining the limits of the plaintiff's cause of action, which, of course, would have no place in any pleading by the defendant.* And we again call attention to the Appellate Court's misconception in representing this

as a defense, of war necessities to be pleaded as a defense, where, as a matter of fact, *this matter arises not as a war necessity or as any necessity to be reviewed by any Court,* but it arises solely as a matter of law under the Federal Control Act, as to what facts can be taken into consideration by the plaintiff as a basis for his cause of action.

As the jury may have found in their general verdict that the Government as a carrier over the Great Northern, through the acts of the Federal manager of that railroad or his agents, was not negligent, but that the Government as a government through the director general or regional director, in distributing cars to the northwestern region, and in the northwestern region to the Great Northern, was negligent, the refusal to give the instruction in question was clearly prejudicial.

II.

THE ALLEGED CONTRACT TO FURNISH CARS AS A DISCRIMINATION.

The defendant contended that, since the days of preferences, free service, and discriminations on a railroad are over, it would be the duty of a carrier at all times, and especially in a time of car shortage, to treat all alike and to furnish cars without an undue preference of one shipper over another and, under private operation, even the president of the railroad, much less a station agent of the corporation in times of private operation, or of the Government under Government operation, would have no authority to give, and could not legally give, a shipper an advantage over others by a special contract to furnish cars. Each

shipper would have to await his turn and his just allotment of cars, and a station agent, or a superintendent of the division, or the president or Federal manager himself, would have no legal authority to nullify the law forbidding the granting of preferences or special service and to contract with a shipper that the shipper should receive his cars to the disadvantage of other shippers and as a discrimination against them, or as a special service to the shipper without any extra charge.

(a)

General Argument.

It will be conceded that, at least when a car shortage exists, so that there are not enough cars available to meet the demands made upon the carrier, it would be unlawful for the carrier to prefer one shipper over another and to give one shipper cars out of his turn or greater in number than he would be entitled to. It is the duty of the carrier, under these circumstances, to treat all alike and to apportion the shortage so that a fair distribution is made of the cars available to the carrier so that, during the season, each patron receives a fair allotment of cars. When there is a car shortage, a shipper is not entitled to all the cars he wants simply because his order is filed first; he is only entitled to his fair share of the available cars, in the light of the demands made.

If, in this situation, all shippers are being treated fairly by a dispatcher or a superintendent, but one shipper attempts to make a private contract with the president of the carrier, or, during Federal control,

with the Federal manager of a railroad, whereby the even distribution, effected by the superintendent or dispatcher, should be defeated, could it be held that this contract was valid? Or, if an even distribution had been ordered by the Federal manager, but a shipper secured a private contract from a superintendent or dispatcher, would it then be the duty of the manager to recognize a supposedly legal obligation of a contract which set at naught his careful arrangements for fair treatment to all, or would it not rather be the duty of the manager to direct the division officials to ignore the contract, illegally made, in defeating the public duties of the carrier?

If these are limitations on the power of the president of the corporation under private operation, or of superintendents and dispatchers and of federal managers under Government operation, how much more clearly does it appear that any station agent, at any of the various stations on the line of a railroad, has no power to enter into a contract for special car service, which will work a discrimination, or provide for a single shipper receiving any cars out of his turn, or in a greater number at one time than is just, bearing in mind the duty of the carrier to work no discrimination and to perform its public service of treating all alike.

Government operation suggests another point. The evidence reviewed shows that a serious car shortage existed all over the United States. The taking over of the railroads by the Government, as a matter of common knowledge, was partly inspired by a desire to relieve this situation. The Government supposedly

needed passenger cars for its troops, and freight cars for the sudden movement of war material. These increased demands for transportation and other reasons supposedly, at least, required the pooling of all cars and the adoption of a means whereby the balance of the cars for private enterprise should be properly distributed. For this purpose, as has been discussed, the Government, as such and not as carrier, promulgated certain governmental regulations for the carriers and, for this purpose, the Government, as carrier and not as a government, on various railroads, arranged for the even distribution of the cars proportioned to the needs of the community. *Can it be contended that either these governmental orders, or these plans as carriers adopted by the Government, can be set at naught by a single shipper stepping up to an agent and laughingly exclaiming that the shortage means nothing to him* and that the carefully worked out governmental orders, as to car supply and car distribution, and the local systematic arrangements by the Government as carrier, have not interfered with him; *he has a contract with the agent.*

These questions are their own answers. It must be the law that, without a tariff provision and a special charge for the extra right, a carrier cannot contract to furnish cars and thereby give a shipper special privileges and an insurance against risk of delays, which other shippers run; and, in times of a car shortage, it being conceded to be the duty of the carrier to treat all alike, a station agent, or the carrier itself, cannot have authority to contract to furnish cars where this would work a discrimination or defeat the carrier in

the discharge of its public duties, and, for this reason it was error in the Court to refuse defendant's Requested Instructions on this subject, and to give instructions to the contrary, overruling objections thereto as set forth in the above Specifications II a, b, c, d and e.

(b)

Statutes.

The following few sections of the Interstate Commerce Act, as set forth in the Compiled Statutes of 1918, are here cited:

Section 8563, subdivision (2),
Section 8565,
Section 8569, subdivision (1),
Section 8569, subdivision (7),
Section 8574, subdivision (4).

(c)

Authorities.

The following cases are directly in point:

Saitta & Jones vs. Penn. R. Co., 179 N. Y. S. 471;
Underwood vs. Hines, 222 S. W. 1037;
C. R. I. & P. Ry. Co. vs. Beatty, 42 Okla. 528; 141 Pac. 442 at 444.

The following cases should be cited by way of analogy:

C. & A. Ry. Co., vs. Kirby, 225 U. S. 155; 32 Sup. Ct. 648; 56 L. Ed. 1033.

As there is no more evil way of working preferences and discriminations contrary to the Federal law, than by recognizing such contracts as legal, the following authorities prohibiting discrimination in rates are in point by way of showing the reasons for the

policy of the nation in an analogous matter:

Pittsburg, etc. R. Co. vs. Fink, 250 U. S. 577; 40 Sup. Ct. R. 27; L. Ed. .....;
L. & N. R. Co. vs. Maxwell, 237 U. S. 94; 35 Sup. Ct. R. 494; 59 L. Ed. 853;
Tex. & Pac. Ry. Co. vs. Mugg, 202 U. S. 242; 26 Sup. Ct. R. 628; 50 L. Ed. 1011;
Tex. & Pac. Ry. Co. vs. Leatherwood, 250 U. S. 478; 39 Sup. Ct. R. 517; 63 L. Ed. 1096.

From the most recent case of Saitta & Jones vs. Penn. R. Co. (supra), the following is quoted:

"The plain reading of sections 1 (b), 3, 6 (a) and 6 (g) of the Interstate Commerce Act, 4 Fed. Stat. Ann. 351-421 (U. S. Comp. St. Secs. 8563, 8565, 8569), prohibits a common carrier from making any special contract relative to its cars as facilities of interstate shipment that is not specified in tariffs filed with the Commission. The defendant has not filed any tariff with the commission that provided for the contract made herein. The following authorities condemn the contract under consideration, and it cannot be the basis of a claim for damages: Chicago & Alton v. Kirby, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501; Am. Smelting Co. v. Union Pac. (C. C. A.) 256 Fed. 737; Georgia, Fla. & Ala. Ry. Co. v. Blish, 241 U. S. 190, 36 Sup. Crt. 541, 60 L. Ed. 948; J. H. Hamline v. Ill. Cent. Ry. (D. C.) 212 Fed. 324; C. R. I. & P. Ry. v. Hardwick, 226 U. S. 426, 33 Sup. Ct. 174, 57 L. Ed. 284, 46 L. R. A. (N. S.) 203; South. Ry. Co. v. Reid, 222 U. S. 424, 32 Sup Ct. 140, 56 L. Ed. 257; Morrisdale Coal Co. v. Penna. Ry. Co., 230 U. S. 304, 33 Sup. Ct. 938, 57 L. Ed. 1494; Southern Ry. Co. v. Prescott, 240 U. S. 632, 36 Sup. Ct. 469, 60 L. Ed. 836."

From the case of C. R. I. & P. Ry. Co. vs. Beatty, supra, cited by respondent in the brief in opposition to the writ, is found the following:

"And in Instruction No. 8 the Court tells the Jury that, in the absence of a specific contract with the shipper, it is the duty of a common carrier to distribute the cars equally between shippers at points along its line. This instruction, in effect, tells the jury that the agent and a shipper could make a valid contract in direct conflict with the terms of the Interstate Commerce Act, and the amendments thereto, and thereby change the obligations imposed upon the carrier by these statutes. Such is not the law. The giving of this instruction was also prejudicial error. St. L. & S. F. R. Co. v. Bilby, 35 Okl. 589, 130 Pac. 1089.

"Under the acts of Congress regulating interstate shipments by common carriers, the shipper and the company are forbidden to enter into contracts whereby any particular person is given any special facility or advantage not open to all other shippers at that time and place. If the contracts in suit gave or attempted to give the plaintiff such privilege or advantage, they were void, and no action could be maintained on account of the breach thereof. Or if the company's failure to furnish the cars at the time its agent agreed with the shipper to furnish them was occasioned by the congested condition of freight traffic over its line at that time, then it incurred no liability for not furnishing the cars. Chicago & Alton R. R. Co. v. Kirby, supra; United States v. Union Stock Yards, 226 U. S. 286, 33 Sup. Ct. 83, 57 L. Ed. 226; Clegg v. St. L. & S. F. R. Co., 203 Fed. 971, 122 C. C. A. 273; Elwood Grain Co. v. St. Joseph & G. I. Ry. Co., 202 Fed. 845, 121 C. C. A. 153; St. Louis, I. M. & S. Ry. Co. v. West Bros. (Tex. Civ. App.) 159 S. W. 142; A., T. & S. F. Ry. Co. v. Holmes, 18 Okl. 92, 90 Pac. 22; St. L. & S. F. R. Co. v. Bilby, 35 Okl. 589, 130 Pac. 1089. These issues were not clearly defined and submitted to the jury in the instructions as they should have been."

A careful reading of the case of O. R. & N. Ry. Co. v. Dumas, 181 Fed. 781, shows that it is really only a

strong dictum, based on fallacious reasoning, and the case was actually decided on a procedural matter with the Court very guardedly limiting its ruling to that precise record and reserving for later decision the exact question now in hand if it should be otherwise presented in some other case.

As regards other decisions which might seem to be to the contrary, it should be borne in mind that most of them (1) do not in fact pass upon the question here raised, unless, possibly, by way of dictum; they were decided (2) prior to the decisions of the Supreme Court of the United States above cited, which are controlling as to interstate shipments; and (3) they antedate and are not in accord with recent Federal Legislation regulating tariffs and charges and the practices of railroads.

Ancient dictum, even decisions, on the liability of carriers, must yield to the more modern realization of what necessarily follows from the concept of a carrier as engaged in the public service, so that its liabilities and expenses, under modern regulatory statutes, to say nothing of the Federal control statute, under which this action was brought, are now appreciated more and more to be public liabilities and public expenses.

Whatever may have been the rule as regards the authority or legal power of a station agent of the corporation, clearly as agent of the Government under Federal control he would not have the authority to enter into such a contract.

(d)

Analogous Cases and Illustrations of Discriminations.

As to whether an express contract for furnishing cars should be held to be prohibited by law unless supported by a special tariff, and as to whether in a time of a car shortage, such a contract should be held, by reason of its effect, to be unlawful as working a discrimination, the decisions in the Kirby and Fink cases, supra, show the policy of the nation and it is, therefore, helpful to compare the relationship between those cases and the present one.

(1) In the Kirby case, supra, for competitive reasons, the carrier contracted to move the Shipper's stock in time to make a particular connection so that it would make a particular market. The shipper might have given his shipment to another carrier and reached the market as expected. This contract was held void. In the instant case, there was no competition, but the Court rules that, by a mere private arrangement between one shipper and a railroad agent, in a car shortage, a promise to have cars on hand on a given day can upset all rules for equitable car distribution and give the shipper a preference over others, either in getting the cars or in compensation for not getting them. The only difference between the two cases is that, though both relate to delays, the Kirby case relates to delays after the shipment has moved and the instant case relates to delays before the shipment has moved. In the one case no action is recognized for negligently soliciting the business and the shipper's

loss is clear. In the present case an action for a failure to give notice of an inability to furnish the cars, if such failure of notice was negligent, would be all that the shipper could ask; indeed, if pleaded and proved, it is doubtful if such an action would lie. Moreover the shipper's damage from such want of notice is extremely limited.

(2) A merchant, ordering goods, is erroneously quoted a rate. The merchant, on receiving the goods, sells them on a narrow margin of profit based on the freight rate which he paid. He cannot, under the Fink case, supra, rely on an express contract for the rate named, nor can he sue for a negligent quotation of the rate. The merchant's damage and its cause is clear. In the instant case the shipper does not sue for even an alleged negligent failure to give him notice of an inability to furnish cars on a date named, in which the damages caused thereby would be small indeed, but he sues for the breach of a contract claiming a loss of market which he claims he had an absolute right to reach, over all other shippers, because of a special contract.

(3) In the two former cases, the free nature of the shipper's claim and the opportunity for collusion between the shipper and the carrier is sufficient to declare the contracts void. Here, too, there is even *a greater opportunity for collusion, for a favored shipper,* who without discrimination, could not reach a market in his regular turn, can insure himself by making an express contract for cars which will compel the carrier to give him the cars or pay him *for the loss of a market,* and this insurance he gets at public expense,

through the carrier, without additional charge and, in a car shortage, as a discrimination against others.

Indeed, to refuse to recognize the validity of such a contract works no hardship at all on the shipper. He does not lose a market because he was not entitled to a market if he could get to it only by an unfair discrimination. He is not necessarily put to additional expenses in holding his cattle, because he would be compelled to hold them anyway awaiting his turn. His only loss conceivable is perhaps some peculiar, limited, small, additional expense which does not peculiarly arise out of any failure to perform the contract but might, in a given case, arise out of a negligent failure to give him notice of the inability to furnish cars. If his right to a cause of action for a negligent failure to give him notice, if such a case shall arise, is recognized, the shipper is fully protected; if a greater right is recognized and if a contract to furnish cars is recognized, especially in a car shortage, he gets a special service for which no special charge is made in the tariffs and, in addition, in an allowance for a loss of market and other damages, the door is opened for the widest collusive fraud and discrimination between a thousand railroad agents and a few favored shippers which could be so carefully concealed that it could never be proved.

Aside from collusion, the recognition of a right to have a preference so created puts a premium on weak memory or false testimony, for the usual case is that there was, in fact, no express contract; the agent denies that he did any such extraordinary thing as to promise to have the cars on hand, but the shipper, disappointed in the sale of his cattle on a sensitive fluc-

tuating market, later vaguely recalls a "promise" by the agent; and it is argued that this vague oral thing can become a legal contract making the carrier assume the risk of all delays and displacing prior car orders of shippers who, declining to swear to a promise, rely only upon the common law obligation of the carrier. If a shipper, contrary to the testimony of the agent, or, as is more usual, even supported by the testimony of an agent, indeed over the written quotation of the agent, should claim a "promise" of a certain rate a few cents less than the tariff charges, both the agent and the shipper acting in good faith, this "promise" is void. Why should a mere disputed alleged oral promise, denied by the agent and worth many dollars to the shipper, who may not be acting in good faith, be held more legal merely because it involves cars and not rates?

Notice thus, in this case, that the supposed promise was oral (Tr. fol. 24). It was denied by the defendant (Tr. p. 51, fol. 114). Its claimed terms, as creating a separate contract with the plaintiff Cornwell for nine cars, was contrary to the written order showing a joint order by Stephens and Cornwell for 24 cars, signed by the shippers (Tr. fol. 113; fol. 47 to 50; p. 38, fol. 87 to 89; p. 45, fol. 102 to 104; p. 50, fol. 112 to 115), was contrary to the joint nature of the undertaking from the beginning in which Stephens and the plaintiff Cornwell jointly rounded up the cattle and jointly cared for and shipped them (Tr. p. 12, fol. 26 to fol. 33; p. 18, fol. 40, to p. 22, fol. 52; fol. 58; fol. 60 to 61; p. 28, fol. 65 to 68); was contrary to their express testimony characterizing the alleged two separate orders of nine cars by Cornwell and 11 cars by

Stephens as "that car proposition" (Tr. p. 19, fol. 43), and "that order of ours" (Tr. p. 37, ll. 31 to 32; fol. 85) was contrary to the later executed shipping contract signed by them showing a single shipment by Stephens and Cornwell of 20 cars (Tr. fol. 47 to 50; p. 46, fol. 103; p. 51, fol. 115; p. 38, fol. 87), and finally the alleged separate orders for nine cars by Cornwell and 11 cars by Stephens, though exactly totaling the number of cars actually loaded was inconsistent with the signed order for a total of 24, 33-ft. cars (Tr. fol. 136 to 137).

It is now argued that this supposed conflict (pp. 11 to 14; 18 to 27; pp. 27 to 31; 37 to 40; 41 to 42; 45 to 60; 63 to 64) between some of the shippers' oral testimony, on the one hand, and the writings signed at the time together with his own other oral testimony, can safely be allowed to work a discrimination not contrary to the policy of the much more appealing Kirby and Fink cases.

(e)

A Distinction to Be Noticed.

Let us bear in mind that this is not an action for damages claimed by reason of an alleged negligent failure of the agent to advise the plaintiff that the cars would not be on hand. No negligence in this particular was alleged, and the parties did not attempt to prove or disprove such an issue, and the Court expressly charged that it was not an issue. (Tr. pp. 80 to 81, fol. 178.)

If this were the cause of action alleged (if the basis of the cause of action was that, though the plaintiff,

by reason of the car shortage could not get cars on October 2nd or until October 16th, it was the duty of the agent to advise him to that effect so that he would not bring in his cattle and be to expense in holding them), then the plaintiff could not recover for any falling in the market, because, by supposition, he was not entitled to any market. The measure of damages would be merely the extra expense, if any, the shipper had been put to by reason of the failure to give him advice or any other damage caused by such failure.

But this is not the cause of action alleged here. Here the cause of action alleged is that, by reason of an express contract, the plaintiff had a legal right to sell his cattle on a certain day's market and this right existed in him, *notice or no notice*. If such a contract is valid when entered into, a notice by the agent that the carrier could not comply with it would be immaterial and would not prevent the plaintiff from recovering the loss of market whether or not notice was given.

(f)

Discussion of Contrary Arguments.

In arguments to the contrary it is sometimes stated that there is nothing illegal in such a contract because there is nothing in the world more innocent than the words used in an express contract to have cars at a particular station at a particular time. It is said that, on the face of the contract, the transaction is perfectly legal. The answer is that the law would have only a limited field of operation if it annulled only contracts which boldly and openly declared their illegal effect.

It is not the wording of the contract that makes it illegal, but its effect.

Similarly it may be said of the contract in the Kirby case, supra, that it is innocent enough, but the point is that thereby, in a guaranty that the connection will be made, the shipper, without an extra charge, is receiving free a special concession not mentioned in the tariffs. So also, by a railroad's express contract to furnish cars, thereby, in the guaranty that the cars will be on hand and that, therefore, the shipper will make a particular market, the shipper, without an extra charge, is receiving without extra charge a special concession beyond the general legal obligation resting on the carrier to furnish the cars within a reasonable time. If only the legal obligation exists, various causes excuse a delay; but, if the contract exists, then the carrier has guaranteed the presence of the cars and runs these risks of delay, and the ordinary excuses for a delay are not recognized. Such additional liability cannot be assumed unless the additional service is specified in the tariffs and a charge made therefor. Moreover, in a time of car shortage, there is the additional feature that the shipper is not only given this unauthorized service without charge, but he can get it only by way of a discrimination overriding the rights of others.

Again where, in a contract between the shipper and the carrier, a rate is misquoted, as in the Fink case, supra, the words are not less innocent, for the parties intend to quote the legal rate, but it is the legal effect of such a contract concerning rates which makes the contract illegal.

The fact, therefore, that the contract for cars does not expressly state that no extra charge is made for the service, or that the shipper is to be given cars out of turn, is not material and does not constitute it a valid agreement. The legal effect of the contract, if recognized, is that the carrier cannot perform it without discriminating against others, or, in the alternative of non-performance, in the recovery of damages, the shipper gets, in effect an unlawful market guaranty.

The other argument based on the supposed hardship on the shipper has already been covered. The hardship is, in fact, greater in other cases; in the present kind of case it rarely exists at all; such hardship as exists is not the loss of a market, for the shipper was not entitled to reach that market out of his turn; such limited hardship as may sometimes exist does not arise at all out of any contract, but out of a failure in some cases on the part of the shipper to make adequate preliminary inquiry through his riders before bringing his cattle in, or on the part of the railroad to give adequate information, an issue not involved in this case. Though a hardship is visited on a shipper, who, after being misquoted a rate by an agent acting in good faith, sells his product in reliance on that rate, no hardship at all is visited on the shipper by a rule merely declaring that a special contract for cars (glibly claimed by the shipper), at least in a car shortage, is void.

III.

MISCELLANEOUS.

Perhaps it should be added that, of course, the Fed-

eral Court is not bound (Atl. Coast Line Ry. Co. v. Burnette, 36 Sup. Ct. R. 75, 239 U. S. 199; Ward v. Love County, 253 U. S. 17, 64 L. Ed. 751; 40 Sup. Ct. R. 419) by the attempted procedural disposition of the first of the two Federal questions here presented.

Undoubtedly also we may assume that respondent's argument will not be further repeated that the record fails to show that the orders of the Director General in his Governmental capacity and the car shortage had anything to do with the plaintiff's delay in getting cars. Such an argument is in the very teeth of the express statement of the record (Tr. p. 60, l. 18, fol. 134, to p. 61, l. 26, fol. 136), and makes the action of counsel on both sides in requesting instructions, and the Court in ruling upon them and in seriously framing its instructions to meet actual issues, a mere inadvertent useless ceremony. Similarly the argument that the adverse general verdict of the jury, based upon a supposed conflict in the evidence, concludes defendant from arguing any errors in instructions in resolving that conflict will doubtless not be repeated here; this matter was fully covered (Tr. p. 93, l. 11, fol. 204, to p. 95, l. 20, fol. 209) in the petition for a rehearing.

Respectfully submitted,

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No. 297

IN THE

Supreme Court of the United States

JAMES C. DAVIS, as Agent of the President of the United States under the Transportation Act of 1920,

Petitioner,

vs.

R. L. CORNWELL,

Respondent.

BRIEF OF RESPONDENT

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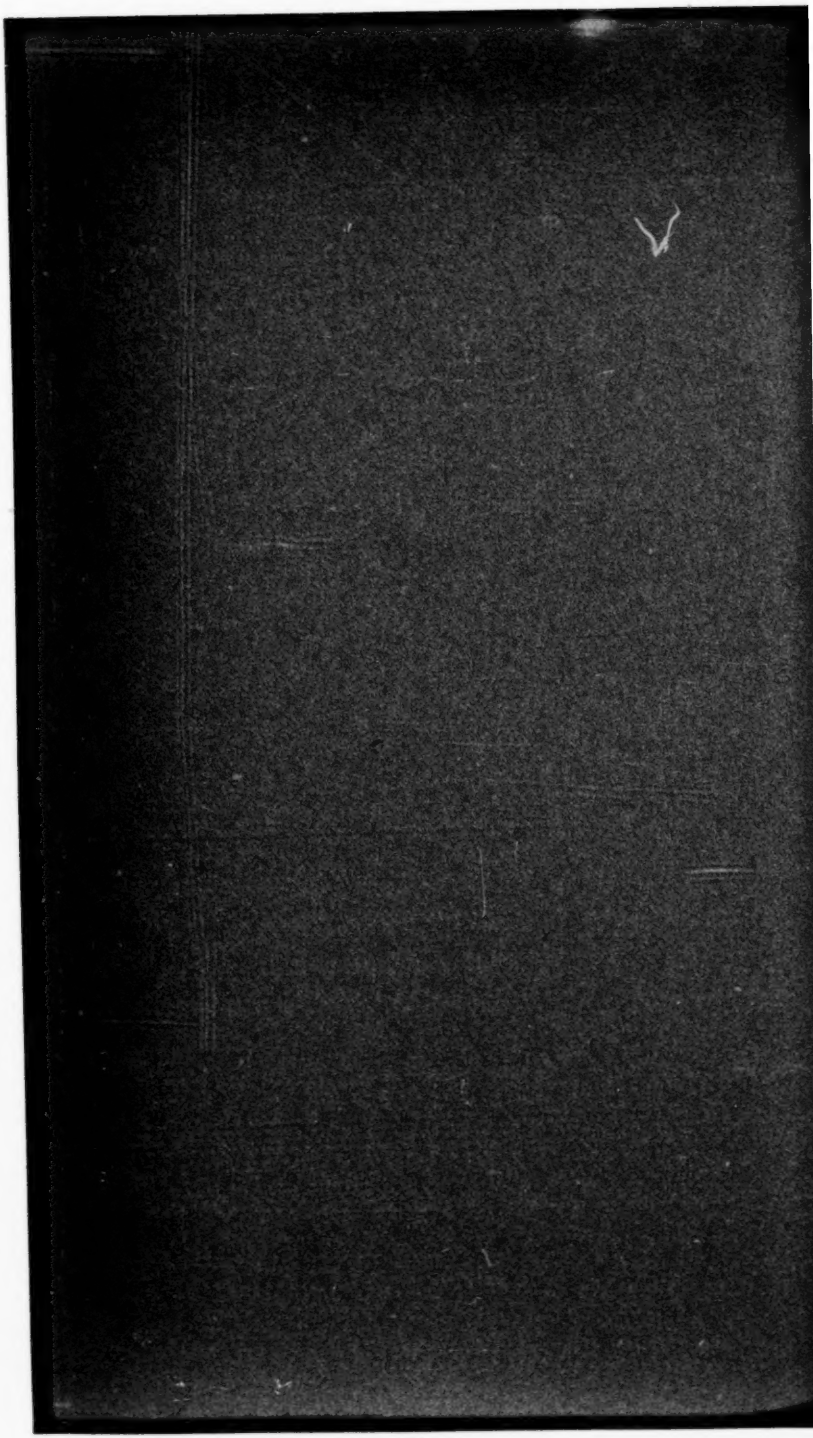
Filed _____, 1929

_____, Clerk.



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IN THE

Supreme Court of the United States

AMES C. DAVIS, as Agent of the President of the United States under the Transportation Act of 1920,

Petitioner,

vs.

. L. CORNWELL,

Respondent.

BRIEF OF RESPONDENT

A.

STATEMENT OF QUESTIONS INVOLVED.

This case comes to this Court upon certiorari to the upreme Court of Montana. By the petition for the rit and the specifications of error contained in Petioner's brief (Brief pp. 9 to 12) but two questions rise. Adopting the condensed paraphrase of the pecifications of error used by Petitioner and appearg upon page 2 of Petitioner's brief, such questions re:

1. The question relative to the conclusiveness of a r distribution made by the Director General as a overnmental Officer as distinguished from car disibution made by him as a Carrier.

2. The question relative to the validity of a railway agent's alleged express contract to furnish cars in a car shortage as beyond his authority and working a discrimination.

These questions are upon Petitioner's own statement the only ones involved herein and which may under the Petition for the Writ and the Specifications of Error, be passed upon by this Court.

B.

HOW THE QUESTIONS AROSE.

1. Conclusiveness of Car Distribution.

(a) The Pleadings.

The complaint (Tr. pp. 1 to 5; fol. 2 to 11) upon which action was tried discloses itself to be in ordinary form for recovery on a contract liability. Paragraph VI of the complaint (Tr. p. 2; fol. 4 and 5) alleges the ordering of the cars by Respondent for October 2, 1918, on September 23rd. Paragraph VII (Tr. p. 2; fol. 5) alleges that in compliance with such order the local agent of Petitioner agreed to have the cars ready by October 2nd. Paragraph VIII (Tr. pp. 2 and 3; fol. 5 and 6) alleges that the time elapsing between September 23rd and October 2nd was a reasonable time, and the further fact that Petitioner knew that Respondent relied upon the promise of the agent to furnish cars. Paragraph X (Tr. p. 3; fol. 7) alleges the failure to furnish cars until October 16th, which is the basis of alleged liability herein.

The answer of Petitioner (Tr. p. 5; fol. 11 and 12)

so far as it is applicable to the allegations of the complaint above set forth is as follows:

"II. Admits that on or about the 23rd day of September, 1918, certain cars were ordered for loading with cattle at Glasgow, Montana, on or about the 2nd day of October, 1918, but defendant denies that the agent of said United States Railroad Administration at said Glasgow promised or agreed on behalf of said Railroad Administration to furnish said cars for loading on October 2d, or any other date.

"III. Further answering defendant admits that said cars were not furnished on said 2nd day of October, 1918, and that said cars were not loaded and received by said Railroad Administration until about the 16th day of October, 1918, but alleges that said cars were furnished within a reasonable time after the order or request for same was placed."

It is obvious that under the pleadings, aside from the question of damage, but two issues material herein are presented, namely:

1. The making of the contract to furnish cars.

2. The issue as to whether the cars were furnished within a reasonable time.

Such issues present the first question stated by Petitioner: "Was the Government as a carrier over the Great Northern negligent?" (Brief p. 3.) As Petitioner states, "this was a proper subject of inquiry and a proper basis of liability." (Brief p. 3.) It is readily apparent that up to this point in the case the second matter presented by Petitioner had not arisen, "whether the Director General, exercising Governmental functions and not his functions as a carrier, was negligent." (Brief p. 3.) If at all, such issue must have arisen by reason of the admission of evi-

dence and the giving or refusing to give instructions thereon.

(b). The Evidence.

The evidence bearing upon this phase of the case is short and appears in the transcript in a condensed form. The words and form used are those of counsel for Petitioner herein. Since such evidence is not quoted but merely paraphrased in Petitioner's brief (pp. 4 and 5), and the importance thereof is obvious, we desire to quote so much of it as we deem pertinent upon the question of car distribution. This evidence appears on pages 60 and 61 of the Transcript (Fol. 134 to 137) and is as follows:

> "Thereupon the witnesses J. P. Sullivan, L. E. Gosselin, and A. E. Knights testified on behalf of the defendant to facts which made it a question of fact for the jury as to whether or not the defendant had exercised reasonable care in furnishing the cars ordered at Glasgow and claimed to be due to the plaintiff, or to the witness Stephens, and making it a question of fact for the pury as to whether or not there was not a great, unusual and extraordinary demand for cattle cars all over the United States in September and October, 1918, and the number of cars to be available for use on the railway of the Great Northern Railway Company was not determined by the representatives of the Director General operating said railway, or by the Federal Manager of said railway, but by the Regional Director of the United States Railroad Administration at Chicago, acting for the Director General in matters relating to car distribution and general railroad matters over the railways of the Great Northern Railway Company, the Northern Pacific Railway Company, the Chicago, Milwaukee & St. Paul Railway Company, the Chicago & Northwestern Railway Company, and other railways in the Northwest and that this said

extraordinary demand and the orders of said Regional Director regarding car distribution to the railway of said Great Northern Railway Company, made it impossible to furnish said cars at an earlier date than they were in fact furnished, the testimony of said witnesses not being conclusive, but making said issues questions of fact for the jury; the witnesses testifying in part that the receipts of cattle at Chicago for September and October, 1918, were the largest of any on record for any previous month of any previous year, and that the receipt of all livestock at Chicago for the year 1918, as well as at the seven other western terminal stock markets, showed that during that year they were the largest receipts according to any previous year on record, and that the receipts of cattle at Chicago for September, 1918, were 67.9 per cent over the receipts for the same month for 1916, and 17.4 per cent over 1917, and for October, 1918, 38.5 per cent for the same month in 1916, and 14.4 per cent for the same month in 1917, and the receipts of cattle at Chicago for the week ending September 28 were the largest on record for receipts for any previous week of any previous year, the records going as far back as 1865, and the week ending Oct. 12, 1918, was the second largest; and that under Government operation cars previously owned by any railroad company were not, for purposes of car distribution, treated as owned by said railway company or assigned to its lines, but same were treated by the Director General as available for the Railroad Administration, to be used on whatever railway over the United States he deemed it proper to distribute them, and that pursuant to this policy, Great Northern cattle cars loaded with cattle on points on the Great Northern Railway Company, which the Great Northern Railway Company had theretofore directed be turned back at So. St. Paul were during the period of Federal control directed to be run through to Chicago."

A casual reading of the above discloses that the only issue arising thereunder is whether "said extraordinary

demand and orders of said Regional Director regar ing car distribution to the railway of said Great Nort ern Railway Company, made it impossible to furni said cars at an earlier date.

By counsel's own wording of the evidence, whi was submitted in identical form to the State Supre Court, he advises us that no question of negligence the part of the Director General in allotting cars presented. The only question presented on this pha of the case is whether such allotment or failure to all had anything to do with the failure of the Gre Northern to furnish cars. In orther words, no ev dence was offered or admitted at the trial which cr ated an issue as to the negligence of the Director Ge eral as an allotting agent, but such evidence was a mitted as only created an issue as to whether the fa ure of the Great Northern to furnish cars was the resu of a failure to allot, a great demand, or somethi else.

We have not as yet reached the point then whe the matter found under the first subdivision of Pe tioner's brief may be said to be properly raised.

From the discussion of the evidence we must pa next to the instructions offered to complete our inve tigation.

(c) The instructions.

Petitioner bases his contentions so far as this pha of the case is concerned upon the refusal of the cou to give Petitioner's requested instruction No. 24 (T p. 71, ll. 12 to 21; Specification of Error IA, Bri p. 9) as follows:

"You cannot review any car distribution made by the Director General himself or by his representatives determining general questions of distribution over the United States. In the matter of car distribution you can find the Director General negligent only if you find that his representatives operating the railway prior to Federal operation known as the Great Northern Railway were negligent in their distribution of cars which he allotted to them or allowed them to use."

This instruction, providing it has sufficient foundation in the pleadings and evidence, and is correct in law, properly raises the first question set forth in Petitioner's brief and now before this Court.

This instruction was requested, as stated in Petitioner's brief, not as defining a defense, but as defining the limits of the plaintiff's cause of action. (Brief p. 23.) This statement made by counsel for Petitioner is extremely important, and will be again noticed later in this brief. This statement is palpably inconsistent with other statements in Petitioner's brief (pages 6 and 7).

(d) Opinion of State Supreme Court.

In passing upon the question here presented, Justice Holloway, speaking for the Supreme Court of Montana, said (Tr. p. 89, fol. 196):

"The number of cars available to the Great Northern line was a matter peculiarly within the knowledge of the defendant, his agents and subordinate officers in charge of that line, and assuming, without deciding, that defendant could be heard to say that the delay in furnishing the cars was occasioned by the war necessities of the government, that was a matter of defense which was neither pleaded nor proved."

We have placed before the Court, so far, every stage of the action upon which the question presented by Petitioner could arise. This has been done with a purpose of giving the court a view of the proceedings which otherwise it could not obtain.

2. Right of Local Agent to Contract.

The second question presented herein might properly be divided into two subdivisions—(1) The authority of the local agent; (2) The discriminatory nature of the contract. However, counsel for Petitioner has assumed that the first falls within the purview of the second, and has argued both matters out on a question of discrimination. We shall adopt the same method. Following the outline used in regard to the first question presented here—the question of distribution of cars—let us ascertain how the matters now under discussion arose.

(a) The Pleadings.

The only issues under the pleadings which have any bearing upon this phase of the case are whether or not a contract was actually made, and whether or not the period between September 23rd and October 2nd was a reasonable time. (Comp. Par. VI, VII, VIII, Tr. pp. 2 and 3; Ans. Par. II and III, Tr. p. 5.)

The giving of the order to the local agent is admitted.

(b) The Evidence.

So far as we can ascertain no evidence was offered or admitted upon the question of the authority of the local agent. The evidence does disclose, however, that

the local agent was in the habit of taking orders for cars and filling them. (Pltffs. Ex. 18, Tr. p. 60, fol. 133 and 134.)

Upon the question of the discriminatory nature of the contract the only evidence at all applicable is that heretofore quoted supra pp. 4 and 5 (Tr. pp. 60 and 61).

(c) The Instructions.

In Petitioner's specifications of error IIA to IIE, Brief, pages 9 to 12, we find error alleged in the refusal to give Petitioner's requested instruction No. 20 (Tr. pp. 70 and 71) and in the giving over Petitioner's objections of Court's Instruction No. 3 (Tr. pp. 72 and 79), and Court's Instruction No. 4 (Tr. pp. 72 and 79.)

As to such instructions suffice it to say at this time that if proper foundation was laid therefor in the pleadings and evidence, and if they state the law correctly, the question of discrimination and the agent's authority in the premises is properly raised.

(d) Opinion of the State Supreme Court.

Upon the question of the discriminatory nature of the contract, the Court said (Tr. p. 88, fol. 194):

> "It must be conceded that it was a primary purpose of the Commerce Act to prohibit unjust discrimination among shippers, and if the contract upon which plaintiff relies contemplated unusual service, advantage or preference to him not open until equal terms to other shippers, it was illegal and beyond the power of the agent at Glasgow to make; but there is not anything upon the face of a contract to furnish nine cars at Glasgow on October 2nd to suggest that plaintiff would receive more than his fair proportion of the cars available at the time, or that the service for which he contracted was not open to all others upon equal terms."

Upon the question of the authority of the local agent to contract the Court said (Tr. p. 89, fol. 195):

> "It could not be controverted that under private control the Great Northern Company's agent at Glasgow would have authority to make the contract in question and bind the company thereby, and it was the intention of the Congress, as indicated by section 10 of the Federal Control Act (40 Stat. 451), that each transportation system under federal control should continue liable substantially as it was under private control, any suit, however, to be brought against the Director General as the legal person responsible for the carrier's acts. It follows that the contract in question is valid and binding upon the defendant."

In such manner was the second matter now before this Court presented and passed upon by the Trial Court and the State Supreme Court.

C.

BRIEF OF ARGUMENT.

In the brief of argument upon the questions of law presented by Petitioner's specifications of error and brief we shall follow as closely as possible the outline used by counsel for Petitioner in their brief.

I.

THE CONCLUSIVENESS OF THE CAR DISTRIBUTION BY THE GOVERNMENT.

(a) As a matter of principle.

The matter urged under subdivisions (a), (b) and (c) have never been controverted in any respect by Respondent herein. The doctrine that the Government in taking over the several railroads of the United States acted as a separate carrier as to each railroad

is too well settled to require either the citation of statute or decision. Naturally, under such circumstances, the liability of the Government as a carrier arises by reason of the negligence of its representatives operating a particular road. We may also assume, without admitting, that in allotting cars to itself as a separate carrier, the Government, or its representatives, acted in a Governmental capacity, and that its actions in such respect may not be reviewed by a court or jury. This assumption is not, however, altogether borne out by the statutes under which the Government took control of the railroads.

The fallacy of Petitioner's argument that because it would be difficult to present evidence to a jury upon the question of car allotment, and that confusion would result by reason of conflicting decisions is readily apparent. Such argument begs the whole question. If car allotment was not a Governmental function then the authorities are one upon the proposition that evidence relating thereto would be inadmissible. Unavailability of cars except for certain reasons set forth in the Montana Code could not be used as a defense.

We are thrown back then upon the proposition that the car allotment was a Governmental function. It is from this premise that Petitioner must start his argument.

(b) As a matter of statute.

As heretofore stated, no controversy arises herein upon the proposition that the Government in operating the Great Northern was a separate carrier.

Upon the question of whether the Government in

allotting cars acted in its Governmental capacity, section 3115-3/4j, Comp. Stat. Suppl. 1919, is somewhat instructive. That section among other things provides:

> "Carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

This quotation is simply made by way of illustration to show that it is by no means certain that Petitioner's contentions in this respect are correct.

It may be suggested also that the Federal Manager of the particular railroad, and the Regional Director, were agents merely of the Director General, and, in the last analysis, of the President. The Federal Manager does not, for the purpose of fixing liability, represent the carrier, nor does the Regional Director. Each is simply a subordinate of the Director General, who by statute is declared subject to liability, even though he is a governmental agency.

Again, no great distinction exists between the pooling described by the Director General and the pooling which would be permitted should the petitions of railroads now pending before the Interstate Commerce Commission be granted, e. g., the petition of the Great Northern, Northern Pacific and Burlington Railroads.

In the latter case certainly the defense here presented would not avail.

Since no reason exists, however, for arguing this matter, or disagreeing with Petitioner's contentions so far as concerns his premise, no further argument will be made in respect thereto.

(c) As a matter of decisions.

With the authorities cited under this subdivision of Petitioner's brief we have no fault to find. The point upon which they are cited is not in controversy herein.

Upon the principle heretofore set forth (subd. a), that unless car allotment was a Governmental question, unavailability of cars for such reason is no defense we cite:

Oregon R. & N. Co. vs. Dumas, 181 Fed. 781;
Harrison vs. Mo. Pac. Ry. Co., 74 Mo. 364;
Deming vs. Grand Trunk R. Co., 48 N. H. 455;
G. C. & S. F. Ry. Co. vs. Hume (Tex.), 27 S. W. 110;
Nichols vs. O. S. L. Ry. Co. (Utah), 66 Pac. 768;
Baxley vs. T. & M. R. Co. (Ala.), 29 So. 451;
Meriwether vs. Q. O. & K. C. Ry. Co. (Mo.), 107 S. W. 434;
St. L. I. M. & S. Ry. Co. vs. Tilby (Ark.), 174 S. W. 1167.

(d) The views of the State Appellate Court.

It is under this subdivision of Petitioner's Brief that we first meet argument and decisions upon the real questions involved. Up to this point no controversy upon questions of law or interpretation of statute or decision exists. Commencing here, however, the views

of Petitioner and Respondent must necessarily diverge.

(1) The State Appellate Court misunderstood the Federal question as involving a question of pleading.

The State Supreme Court tersely disposed of Petitioner's contentions upon this point as follows (Tr. p. 89):

> "The number of cars available to the Great Northern line was a matter peculiarly within the knowledge of the defendant, his agents and subordinate officers in charge of that line, and assuming, without deciding, that defendant could be heard to say that the delay in furnishing the cars was occasioned by the war necessities of the Government, that was a matter of defense which was neither pleaded nor proved."

As we shall see, this disposition of the matter was proper.

(2) As a question of Pleading.

Where evidence has been introduced without objection there can be no question but that for all purposes issues are deemed presented to the jury regardless of the state of the pleadings. As an abstract statement of the law obtaining in this jurisdiction, it is unquestionably correct and the authorities cited under this portion of the brief are decisive. However, if the evidence introduced does not raise the issue contended for, then no amendment is made, and a discussion of the pleadings and the issues made thereunder is proper. We shall see in the next subdivision of this brief no such issue as suggested by Petitioner was raised, and no such amendment, by implication or otherwise, was made.

(3) Question of Pleading continued.

The alleged error in this phase of the case arises upon the refusal of the Trial Court to give Petitioner's requested instruction No. 24 (Tr. p. 71, ll. 12 to 21). The purpose of such instruction, to use Petitioner's own language, was to prevent the jury from founding its verdict "on any evidence of supposed negligence of the Director General in not distributing enough cars to the Great Northern." (Brief, pp. 6 and 7.) It was offered, says Petitioner, not as a defense, "but as defining the limits of the plaintiff's cause of action." (Brief p. 23.)

It is elementary that there must be some basis for a requested instruction in the pleadings and in the evidence.

Bullard vs. Smith, 28 Mont. 387;
Yoder vs. Reynolds, 28 Mont. 183;
First Natl. Bank vs. Carroll, 35 Mont. 302;
Sullivan vs. Metropolitan Ins. Co., 35 Mont. 1;
Riley vs. Northern P. R. Co., 36 Mont. 545;
Miller's Estate, 37 Mont. 545;
Lindsay vs. Kroeger, 37 Mont. 231;
Marron vs. Great Northern R. Co., 46 Mont. 593.

The only possible theory for the instruction was to excuse, if possible, the delinquency of the carrier, assuming the contract to be non-discriminatory and valid.

Section 7452, Revised Codes of Montana, 1921, provides:

"The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate:

"1. When such performance or offer is prevent-

ed or delayed by the act of the creditor, or by the operation of law, even though there may have been a stipulation that this shall not be an excuse;

"2. When it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary; or,

"3. When the debtor is induced not to make it, by any act of the creditor intended or naturally tending to have that effect, done at or before the time at which such performance or offer may be made, and not rescinded before that time."

This section is exclusive by reason of Section 10703 of the Revised Codes of Montana 1921, which provides:

"In this state there is no common law in any case where the law is declared by the code or statute; but where not so declared, if the same is applicable and of a general nature, and not in conflict with the code or other statutes, the common law shall be the law and rule of decision."

Matters tending to excuse failure to perform or delay in performance must be specially pleaded,

McFarland vs. Welch, 48 Mont. 196,

and cannot be introduced in evidence under a mere denial.

13 C. J. 736;
Eucalyptus Growers Assn. vs Orange Co. N. & L. Co. (Cal.), 163 Pac. 45;
Lord vs. Miller (Wash.), 150 Pac. 631;
Morse vs. Tillotson & W. Co. (C. C. A.), 253 Fed. 340;
Lee Bros. & Greer vs. Glenn (S. C.), 99 S. E. 757.

In Oregon R. & N. Co. vs. Dumas, 181 Fed. 781, excuse was properly pleaded.

Some contention is made that no necessity arose for

pleading such matters in avoidance by reason of the fact that the court should take judicial notice of the fact of Federal control and war necessities. The fallacy of such a contention and its inapplicability to the present case is apparent.

Assuming that the Court took judicial notice of Federal control, war necessities and even of the fact that cars were pooled and allotted by the Government, it still could not take judicial notice of the fact that Petitioner intended to rely upon such facts for his defense unless they were pleaded.

> Arkansas vs. Kansas & T. C. Co., 183 U. S. 185, 22 S. Ct. 47, 46 L. Ed. 144;
> Edwards vs. American Ry. Ex. Co. (Mo.), 216 S. W. 781.

Under no circumstances could any court take judicial notice of the fact that insufficient cars were allotted to the Great Northern. Even Petitioner recognizes the force of this argument when he insists that the *evidence* introduced by him is sufficient to show such fact.

Under the authorities supra it is apparent that Petitioner's requested instruction No. 24 could not be based upon any issue raised by the pleadings, and unless the pleadings were amended by evidence admitted without objection the refusal to give the instruction was not error. Realizing the force of Respondent's contention in this respect Petitioner contends that the evidence admitted without objection (Tr. pp. 60 and 61) does amend the pleadings and so renders the instruction proper. With such contention Respondent disagrees.

Again we call the attention of this Court to the fact

that the matter appearing on pages 60 and 61 of the Transcript is in the language of counsel for Petitioner herein. Petitioner says that such evidence raises "a question of fact whether this was a negligent distribution or otherwise." But the language of the Transcript will bear no such interpretation. That evidence was introduced for the following purposes only:

1. To show that cattle cars were pooled and allotted by the Regional Director acting under the Director General.

2. To show a great and unusual demand for cattle cars.

3. To raise an issue of fact for the determination of the jury as to whether *"this said extraordinary demand and the orders of said Regional Director regarding car distribution to the railway of said Great Northern Railway Company, made it impossible to furnish said cars at an earlier date than they were in fact furnished."*

Under such evidence there could be no review of the orders of the Regional Director in allotting cars, because no order of his was in evidence. Had such matter been presented in defense surely a different method would have been adopted. Records showing what allotment was made and evidence showing impossibility of performance would have been introduced. But counsel for Petitioner admits that such evidence as was introduced was not offered or admitted for the purpose of defense. (Brief p. 23.)

Under the facts presented in the Trial Court no review of the order of allotment by the jury was neces-

sary or even possible. The only issue presented to them, using Petitioner's own language, was whether the delay in performance was or was not due to such allotment and an extraordinary demand.

By the verdict all issues of fact were resolved in favor of the plaintiff, Respondent herein.

Ellinghouse vs. Hansen Packing Co., 66 Mont. 444, 213 Pac. 1087.

As we have seen, the only possible theory upon which such evidence was admissible and the instruction proper was to show an excuse for delay in performance under section 7452, Revised Codes of Montana, 1921, supra.

Even assuming, therefore, that such evidence was sufficient to raise the issue, the jury by its verdict found against Petitioner thereon, and its finding is conclusive.

If the matter presented was a defense as urged by Petitioner the jury must have found that the delay was not occasioned by the failure to allot cars.

Ellinghouse vs. Hansen Packing Co., supra.

It is clear, therefore, that the evidence submitted by Petitioner did not amend the pleadings in the respect contended for, nor does such evidence raise the issue suggested by counsel for Petitioner. In either of such events the requested instruction was unnecessary and improper and no error was committed by the court's refusal.

It is equally clear that the Petitioner was not prejudiced by such refusal, for, assuming that the issue as

contended for was raised by the evidence, the jury found against Petitioner thereon by its verdict.

(4) As a matter of practice.

For other reasons equally cogent no error was committed in the refusal of this instruction.

It is the rule of law in Montana that no error is committed in the refusal of a requested instruction where its substance was amply covered in other instructions.

> Hunt vs. Van, 61 Mont. 395, 202 Pac. 573;
> McLean vs. Rice, 63 Mont. 556, 208 Pac. 252;
> Mitchell vs. Northern P. R. Co., 63 Mont. 500, 208 Pac. 903.

Court's instruction No. 16 (Tr. p. 81, fol. 179), Petitioner's requested instruction No. 23 (Tr. p. 71, l. 11) is as follows:

> "The defendant is not liable for damages, if any, to the animals not proximately caused by his, defendant Director General's own acts or neglects, if any, or those, if any, of his representatives. The only damages, if any, for which recovery may be had by the plaintiff, if your verdict is for the plaintiff, is such as you may find was proximately caused by some act or neglect of defendant."

This instruction which defines "the basis of the plaintiff's cause of action," was requested by Petitioner. Taken in connection with the pleadings which charge only negligence of the Director General as a carrier, the evidence of plaintiff which deals only with his negligence as a carrier, and the Court's charge as a whole, this instruction covers the matter sought to be covered by requested instruction No. 24.

At this point it may be well to point out to the Court

some statements appearing in Petitioner's brief *which the record does not justify.*

On pages 22 and 23, Petitioner says:

> "Literally the plaintiff, as something on which he wanted to base his cause of action, stressed negligence on the part of the Government in not distributing cars to the Great Northern, and the objection is now made that, though this can be used in the trial court favorably for a plaintiff as a basis for his cause of action and as a basis for arguing a verdict in his favor, and though the jury may have found a verdict for the plaintiff based solely on the alleged negligent distribution to the Great Northern, nevertheless, the defendant could not urge an error in an instruction given to this effect, or error in a refusal correctly to advise the jury as to the nature of the plaintiff's cause of action, because these contentions, *made by the plaintiff as the basis of his cause of action,* were not pleaded by the defendant as a defense."

Similar assertions appear on page 23 of Petitioner's brief.

We challenge counsel for Petitioner to show from the complaint, the evidence on behalf of Respondent, or the instructions requested by Respondent any basis for such assertions. The matter complained of by Petitioner was injected into the record by counsel for Petitioner himself. The basis of Respondent's cause of action is so apparent that further comment upon such assertions appearing in Petitioner's brief is unnecessary.

(5) As a matter of law.

For yet another reason no error was committed by the Court in the refusal to give Requested Instruction No. 24.

From the evidence submitted by Petitioner upon this phase of the case it is apparent that the Petitioner as a carrier, at the time the contract was made knew, or should have known of the facts relative to car allotments and congestion. These were matters "peculiarly within the knowledge of the defendant, his agents and subordinate officers in charge of that line." In such event the contract must be construed as having been entered into with such facts in mind, and the matter introduced is no defense.

13 C. J. 639;
Paine vs. Parkhurst, 126 C. C. A. 195, 205 Fed. 740;
Transparent Rubber Wks. vs. Glass Co. (N. J.), 105 Atl. 299.

This rule was applied specifically to delay by carrier by the Supreme Court of Montana in the case of

Nelson vs. Great Northern R. Co., 28 Mont. 297, 72 Pac. 642,

and in other jurisdictions.

10 C. J. 292 and cases cited.

Under such circumstances the giving of Petitioner's requested instruction would have constituted error.

It is therefore respectfully submitted that so far as the first ground of error presented herein is concerned the decision of the Supreme Court of Montana should be affirmed.

II.

CONTRACT AS A DISCRIMINATION.

Petitioner's premise on this phase of the case is that it is the duty of the carrier at all times to treat all alike and to furnish cars without an undue preference of one

shipper over another, and that no officer or agent of the railroad could legally give an advantage to one shipper over another may well be admitted as a proper statement of law.

(a) General argument.

Assuming the above premise to be true as a matter of law, it is proper to next ascertain whether such a question arose in the Trial Court, and if so the manner in which it arose.

The question of what constitutes an undue preference or advantage under Section 8565, Comp. Stat. 1916, is a question of fact.

> Texas & P. R. Co. vs. Interstate Comm. Comm., 16 S. Ct. 666, 162 U. S. 197, 40 L. Ed. 940;
>
> Interstate Comm. Comm. vs. Alabama M. R. Co., 18 S. Ct. 45, 168 U. S. 144, 42 L. Ed. 414;
>
> Pennsylvania Co. vs. U. S., 35 S. Ct. 370, 236 U. S. 351, 59 L. Ed. 616.

The invalidity of such contract by reason of its being discriminatory is a matter of defense to be pleaded and proved.

> Engemoen vs. Chicago, St. P., M. & O. R. Co., 210 Fed. 896.

A casual reading of the answer herein discloses that no defense is alleged therein upon the matter of discrimination.

As to the evidence a like failure of proof is apparent. The burden of showing that a contract between a carrier and shipper is preferential and discriminatory is upon the party asserting it.

> N. Y. C. & H. R. Co. vs. General E. Co., 153 N. Y. S. 478.

There was not any evidence whatever offered or introduced by Petitioner showing or tending to show that Respondent was receiving better treatment than other shippers. How, under such circumstances, could the Trial Court in the first instance, the State Supreme Court, and this Court now hold that as a matter of law the contract was discriminatory. If Respondent did not choose to defend upon that ground in the lower court then he may not complain here.

The specifications of error IIA to IIE upon this phase of the case relate to the giving and the refusal to give three certain instructions.

Specification IIA is based upon the refusal of the Trial Court to give Petitioner's requested instruction No. 20 (Tr. p. 70, l. 45, to p. 71, l. 5) as follows:

> "A Station Agent of the Director General has no authority to enter into an express contract to furnish cars on a date named by a shipper irrespective of the general service due the public, and his express agreement, if any, to furnish the cars on that date is not binding if that date is not a reasonable time."

Yet the court gave Petitioner's requested instruction 21 (Tr. p. 71), court's instruction No. 14 (Tr. p. 81), which covers exactly the same matter as is covered by Petitioner's requested instruction No. 20.

Court's instructions numbered 5 (Tr. p. 79) and 11 (Tr. p. 80) also cover substantially the same questions. No error was committed, therefore, in refusing the requested instruction.

> Hunt vs. Van, 61 Mont. 395, 202 Pac. 573;
> McLean vs. Rice, 63 Mont. 556, 208 Pac. 252;
> Mitchell vs. N. P. R. Co., 63 Mont. 500, 208 Pac. 903.

As to Specifications IID and IIE, which relate to

court's instruction No. 4 (Tr. pp. 72 and 79), and Petitioner's objection thereto (Tr. p. 72), the objection discloses that no such question was raised in the Trial Court by such objection as is raised herein. Under such circumstances the Petitioner may not now urge an objection which he did not urge in the Trial Court.

Keokuk Bridge Co. vs. Illinois, 20 S. Ct. 205, 175 U. S. 626, 44 L. Ed. 299;
Dewey vs. Des Moines, 19 S. Ct. 379, 173 U. S. 193, 43 L. Ed. 665.

So far as Specifications IIB and IIC arising over the giving of court's instruction No. 3 (Tr. p. 79) and Petitioner's objection thereto (Tr. p. 72), suffice it to say that it must be considered along with the other instructions given by the Court.

Fitschen vs. Thomas, 9 Mont. 52;
Stephens vs. Elliott, 36 Mont. 92;
Frederick vs. Hale, 42 Mont. 153;
Harrington vs. B. A. & P. R. Co., 36 Mont. 478;

and when so considered is not open to the objection made to it. This is particularly true when it is considered with court's instructions 5 (Tr. p. 79), 11 (Tr. p. 80) and 14 (Tr. p. 81). The same is true as regards the instruction set forth in Specifications IID and IIE.

However, even supposing the question of discrimination to be properly raised, the contract is not objectionable upon the ground urged.

Under private control it could not be controverted that the Great Northern Company's agent at Glasgow

would have authority to make the contract in question and bind the company thereby.

10 C. J. 218;
1 Elliott on Railroads (3rd Ed.), Sec. 345;
Wood vs. Chicago, M. & St. P. Ry Co., 68 Ia. 491, 27 N. W. 473;
Stewart vs. Chicago, R. I. & P. Co., 172 Ia. 313, 151 N. W. 485;
Easton vs. Dudley, 78 Tex. 236, 14 S. W. 583;
Mechem on Agency, Sec. 993;
P. C. C. & St. L. R. Co. vs. Racer (Ind.), 37 N. E. 280;
Clark vs. Ulster & D. R. Co. (N. Y.), 81 N. E. 766;
Texas-Midland R. Co. vs. O'Kelley (Tex.), 203 S. W. 152;
Harrison vs. Mo. Pac. R. Co., 74 Mo. 364;
Nichols vs. O. S. L. R. Co. (Utah), 66 Pac. 768;
McNeer vs. C. & O. R. Co. (W. Va.), 86 S. E. 887;

and the Federal Control Act did not change this rule.

Missouri P. R. Co. vs. Ault, 256 U. S. 554, 41 S. Ct. 593, 65 L. Ed. 1087.

Such a contract is not contrary to public policy, is not violative of the Interstate Commerce Act, and is not discriminatory.

Oregon R. & N. Co. vs. Dumas (C. C. A.), 181 Fed. 781;
C. R. I. & P. R. Co. vs. Beatty (Okla.), 141 Pac. 442;
10 C. J. 213;
Baxley vs. T. & M. R. R. Co., 128 Ala. 183, 29 So. 451;
International G. N. R. Co. vs. Young (Tex.), 28 S. W. 819;
Nichols vs. O. S. L. R. Co., supra.

Outland vs. Sea Board A. L. R. Co. (N. C.), 46 S. E. 735;
Chattanooga S. R. Co. vs. Thompson, 133 Ga. 127, 65 S. E. 285;
Midland V. R. Co. vs. Hoffman Coal Co., 91 Ark. 180, 120 S. W. 380;
Mathis vs. Southern R. Co., 65 S. C. 271, 43 S. E. 684;
Clark vs. Ulster & D. R. R. Co., 189 N. Y. 93, 81 N. E. 766.

This must be especially true where the time expressed in the contract is reasonable and is so found by the jury under proper instructions, as in the present case, and where, as in this case, no complaint is made of the time given.

Baker vs. St. L. R. Co., 145 Mo. App. 189, 129 S. W. 436.

Governmental orders, war necessities, and traffic congestion afford no excuse under the evidence as presented.

Oregon R. & N. Co. vs. Dumas, supra;
Paine vs. Parkhurst, 126 C. C. A. 195, 205 Fed. 740.

The evidence herein shows (Tr. p. 49, fol. 111) that cattle cars were actually available in the Glasgow stock yards of Petitioner on September 23, 1918.

In closing this subdivision of the brief it may be pertinent, in view of Petitioner's arguments, to ask wherein the pleadings or the evidence disclose that Respondent was to receive, under the contract, more than his fair share of the available cars, or cars out of his turn, or that by such contract the railroad was prevented from treating all shippers alike? Nothing in Peti-

tioner's answer raises such questions. None of his witnesses testified that such was the fact.

(b) Authorities cited by Petitioner.

The case of Texas & P. R. Co. vs. Leatherwood, 250 U. S. 478, 39 S. Ct. 517, 63 L. Ed. 1096, does not appear to bear in any way upon the questions presented herein.

The cases of

Pittsburgh, etc., R. Co. vs. Fink, 250 U. S. 577, 40 S. Ct. 27, 63 L. Ed. 1151,
L. & N. R. Co. vs. Maxwell, 237 U. S. 94, 35 S. Ct. 494, 59 L. Ed. 853,
Texas & Pac. Ry. Co. vs. Mugg, 202 U. S. 242, 26 S. Ct. 628, 50 L. Ed. 1011,

are actions to recover the difference between rates charged and the established rates. In each case the question of discrimination was directly raised by pleading and proof and the tariffs appear to have been introduced as proving the discrimination. No such pleading and proof appear in the present action.

In the case of C. R. I. & P. Ry. Co. vs. Beatty, 42 Okla. 528, 141 Pac. 442, the court held that an instruction which said in terms that a special contract could be relied upon to set aside an equal distribution was erroneous. This is undoubtedly correct law, but no similar instruction was offered or given herein. In that case too there is a suggestion that if the contract, though special, is one which is not discriminatory it is valid.

What the answer contained in the case of Underwood vs. Hines, 222 S. W. 1037, is not disclosed. The matter set forth in the opinion, however, appeared "in the case without controversy," and the court held the

demurrer to the evidence should have been sustained. As the Supreme Court of Montana held in the instant case "the facts recited in the opinion distinguish that case from the one now before us." (Tr. p. 89.)

In the case of Saitta & Jones vs. Pennsylvania R. Co., 179 N. Y. S. 471, the evidence disclosed that "the defendant had not filed any tariff with the commission that provided for the contract made." No such evidence appears in the present case.

The leading case of Chicago & A. R. Co. vs. Kirby, 225 U. S. 155, 32 S. Ct. 648, 56 L. Ed. 1033, is much relied upon by Petitioner as being analogous to the instant case. A reading of the decision in that case, however, only serves to give added force to Respondent's position here. In that case the evidence disclosed the following:

> "That the railroad company had established and published through joint rates and charges upon carload shipments of livestock to New York is not disputed. The rates furnished the defendant in error were the regularly published rates. Those rates and schedules did not provide for an expedited service, nor for transportation by any particular train. Neither was Kirby required to pay any other or higher rate for the promised special service, by which his car was to be carried so as to be attached to the fast stock special and carried by it to New York."

Counsel for Petitioner calls our attention to no such evidence appearing in the record here.

Further, the record herein discloses and the jury found that the time given in the contract for the furnishing of cars was a reasonable time taking into consideration the various elements now claimed to show a

discrimination. This finding is not open to question. The contract under such circumstances was one, therefore, which the railroad could make with anyone, for it is bound, contract or no contract, to furnish its equipment to all persons within a reasonable time. The word "reasonable" itself presupposes equal facilities. This is Petitioner's own theory illustrated in his request for instructions (No. 16, Tr. p. 70, No. 20, Tr. p. 71), and the giving, at his request, of Court's instruction No. 14 (Tr. p. 81).

The cases above set forth are the only ones cited by Petitioner as sustaining his position. However, it may be further pointed out that the cases upon which such authorities are based distinguish themselves from the instant case in the same manner as those above particularly noticed.

While it may be true, as counsel suggests, that railroads in modern times are a public liability and a public expense, yet such an hypothesis can hardly change fundamental rules of pleading and practice, or of contract law.

(c) Analogous cases and illustrations of discriminations.

The discussion contained in this portion of Petitioner's brief illustrates as clearly as anything we have said the distinctions between the authorities relied upon by him and the present case. A review of such discussion shows the following elements claimed to disclose a discrimination:

1. No special tariff shown covering special contract.

2. No right to make a special market.

So far as the first of the above elements is concerned, suffice it to say that the burden was upon Petitioner to show a discrimination. This burden he did not care to accept. He produced no proof showing that Respondent did not pay a special tariff, assuming that the contract was special. Nor did he show that the Great Northern had no special tariff covering such contracts. This element is not, therefore, under consideration herein.

A discussion of the second point is equally outside the record.

In giving its reasons for reversing the case of Chicago & A. R. Co. vs. Kirby, supra, the court said:

> "There was no count based upon the carrier's liability for negligence in not promptly shipping and delivering."

Yet that is exactly the basis of the present action. The complaint simply states (Par. XII, Tr. p. 4) that plaintiff was damaged (1) by reason of having to hold his cattle an unreasonable length of time, and (2) by reason of a failure to promptly ship and deliver.

If October 2nd was a reasonable time for the furnishing of cars, then the time of arrival in Chicago becomes a mere matter of mathematical computation. That date of expected arrival is not a special market. It is simply the market to which any shipper is entitled under the obligation of the railroad to promptly ship and deliver. Under instructions given the jury at Petitioner's request the jury found October 2nd to be a reasonable date for the furnishing of cars taking into consideration war necessities, allotment of cars and an extraordinary demand. That finding, made at Peti-

tioner's request, makes his argument on this phase of the case academic.

It should be borne in mind also that a mere apparent preference is not in itself sufficient to render the contract void. The preference must be undue or unreasonable before it becomes under the statute discriminatory.

> Manufacturers Railway Co. vs. U. S., 246 U. S. 457, 38 S. Ct. 383, 62 L. Ed. 831.

So long as the contract forces the railroad to perform nothing unreasonable under the facts and circumstances shown by the evidence it will not be held invalid.

On pages 34 to 36 of Petitioner's brief appears certain matter which it is only necessary to notice briefly. It has no bearing upon the questions properly presented to this Court under the Writ of Certiorari. It relates to conflicts of evidence resolved in Respondent's favor by the verdict of the jury. The kindest thing that may be said of it is that it is set forth in the brief for the apparent purpose of creating prejudice against Respondent.

Under subdivisions (e) and (f) of Petitioner's brief, we find he again falls into the error of assuming that the action is one for damages for failure to reach a certain day's market. This argument is answered by the plain allegations of the complaint. The distinction between the cases is aptly pointed out in the Kirby case, supra.

It may be said in closing that if Petitioner's argument upon this phase of the case is applicable under the pleadings and proof, then no recovery can ever be

had for a failure to promptly ship and deliver. We should always meet the plea that a special market was being insisted upon. This argument is its own answer.

Respectfully submitted,

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Great Falls, Montana,
Attorneys for Respondent.

Service of the within brief and receipt of..... copies thereof admitted this.....day of....., 1924.

.....
Attorney for Petitioner.

DAVIS, AS AGENT OF THE PRESIDENT OF THE UNITED STATES UNDER THE TRANSPORTATION ACT OF 1920, *v.* CORNWELL.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 297. Argued February 26, 1924.—Decided April 21, 1924.

A contract by a railroad to furnish cars on a certain day for interstate transportation as common carrier, is void if not provided for in the published tariffs. *Chicago & Alton R. R. Co.* v. *Kirby*, 225 U. S. 155. P. 561.

66 Mont. 100, reversed.

CERTIORARI to a judgment of the Supreme Court of Montana affirming a judgment against the agent appointed by the President under the Transportation Act on a special contract to furnish cars, made by a station agent with the plaintiff during the period of federal control of railroads.

Mr. I. Parker Veazey, Jr., with whom *Mr. F. G. Dorety* was on the brief, for petitioner.

Mr. George E. Hurd, with whom *Mr. Edwin L. Norris* was on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

While the railroads were under federal control, Cornwell ordered of a station agent empty cars to be ready

October 2, 1918, for loading with cattle to be transported in interstate commerce as common carrier. This action against Davis, the agent of the President designated under Transportation Act, 1920, was brought in a state court of Montana to recover damages for failure to supply the cars. The plaintiff sued on an express contract to furnish them on the day named. It was not shown, or contended, that the published tariffs governing the contemplated shipment provided in terms for such a contract. The defendant asked for a directed verdict; the request was refused; and the jury was instructed that, if the promise was made, the defendant was liable for its breach, even if the carrier was unable to furnish the cars. A verdict was rendered for the plaintiff; the judgment entered thereon was affirmed by the highest court of the State; and the case is here on writ of certiorari under § 237 of the Judicial Code as amended. 262 U. S. 740. Whether, under the Interstate Commerce Act as amended, the express promise to furnish cars was valid is the only question requiring decision.

The transportation service to be performed was that of common carrier under published tariffs, not a special service under a special contract, as in *Chicago, Rock Island & Pacific Ry. Co.* v. *Maucher*, 248 U. S. 359. The agent's promise that the cars would be available on the day named was introduced to establish an absolute obligation to supply the cars, not as evidence that the shipper had given due notice of the time when the cars would be needed, or as evidence that the carrier had not made reasonable efforts to supply the cars. The obligation of the common carrier implied in the tariff is to use diligence to provide, upon reasonable notice, cars for loading at the time desired. A contract to furnish cars on a day certain imposes a greater obligation than that implied in the tariff. For, under the contract, proof of due diligence would not excuse failure to perform.

Chicago & Alton R. R. Co. v. *Kirby*, 225 U. S. 155, settled that a special contract to transport a car by a particular train, or on a particular day, is illegal, when not provided for in the tariff. That the thing contracted for in this case was a service preliminary to the loading is not a difference of legal significance. The contract to supply cars for loading on a day named provides for a special advantage to the particular shipper, as much as a contract to expedite the cars when loaded. It was not necessary to prove that a preference resulted in fact. The assumption by the carrier of the additional obligation was necessarily a preference. The objection is not only lack of authority in the station agent. The paramount requirement that tariff provisions be strictly adhered to, so that shippers may receive equal treatment, presents an insuperable obstacle to recovery.[1]

Reversed.

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[1] Compare *Saitta & Jones* v. *Pennsylvania R. R. Co.*, 179 N. Y. S. 471; *Underwood* v. *Hines*, 222 S. W. (Mo.) 1037; *Chicago, Rock Island & Pacific Ry. Co.* v. *Beatty*, 42 Okla. 528, 533, 534. Of the cases relied upon by respondent, *Wood* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 68 Iowa, 491; and *Harrison* v. *Missouri Pacific Ry. Co.*, 74 Mo. 364, arose before the enactment of the Act to Regulate Commerce; *Easton* v. *Dudley*, 78 Tex. 236; *Nichols* v. *Oregon Short Line R. R. Co.*, 24 Utah, 83; *Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Racer*, 10 Ind. App. 503; *Mathis* v. *Southern Ry. Co.*, 65 S. Car. 271; *International & Great Northern R. R. Co.* v. *Young*, 28 S. W. (Tex. C. A.) 819; *Outland* v. *Railroad Co.*, 134 N. C. 350; *Chattanooga Southern R. R. Co.* v. *Thompson*, 133 Ga. 127; *Midland Valley R. R. Co.* v. *Hoffman Coal Co.*, 91 Ark. 180; and *Oregon R. R. & Nav. Co.* v. *Dumas*, 181 Fed. 781, were decided after the enactment of the Act to Regulate Commerce, but before the decision of the *Kirby Case* (1912); *McNeer, Talbott & Johnson* v. *Chesapeake & Ohio Ry. Co.*, 76 W. Va. 803, and *Stewart* v. *Chicago, Rock Island & Pacific Ry. Co.*, 172 Iowa, 313, were decided after the *Kirby Case;* but the rule there declared appears not to have been called to the attention of the court. *Clark* v. *Ulster & Delaware R. R. Co.*, 189 N. Y. 93; *Texas Midland R. R.* v. *O'Kelley*, 203 S. W. (Tex. C. A.) 152, dealt with intrastate shipments.